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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

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# No. 320

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NEWTON W. ELLIS,

*Petitioner,*

*vs.*

UNION PACIFIC RAILROAD COMPANY,

*Respondent*

---

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA AND BRIEF IN SUPPORT THEREOF

---

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(The above cases cited in Section (4) of Argument)

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1946**

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# No. 320

---

**NEWTON W. ELLIS,**

*Petitioner,*

*vs.*

**UNION PACIFIC RAILROAD COMPANY,**

*Respondent*

---

## PETITION FOR WRIT OF CERTIORARI

**To the Supreme Court of Nebraska**

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*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

Comes now Newton W. Ellis, the above named petitioner, and respectfully petitions this Honorable Court to grant Writ of Certiorari to review the decision and judgment of the Supreme Court of Nebraska rendered and entered on the 22nd day of March, 1946, in the case lately pending in said Supreme Court of Nebraska, styled *Newton W. Ellis, Plaintiff and Appellee,* v. *Union Pacific Railroad Company, Defendant and Appellant,* being No. 31889 of Causes on the docket of said Supreme Court of Nebraska reversing the judgment of Ten Thousand Dollars ($10,-

000.00) and costs of the District Court of Douglas County, Nebraska, in said cause, in favor of your petitioner and against the respondent herein, which said judgment of the Supreme Court of Nebraska became final on the 22nd day of March, 1946, by the overruling by that Court of petitioner's Motion for Rehearing. *Ellis* v. *Union Pacific Railroad Co.*, 22 N. W. (2d) 20 (R. 376).

That said Motion for Rehearing was duly and timely made after the Supreme Court of Nebraska filed, on July 20, 1945, a prior decision reversing the judgment of the District Court and dismissing the action. *Ellis* v. *Union Pacific Railroad Co.*, 146 Neb. 397, 19 N. W. (2nd) 641. Motion for Rehearing (R. 355).

That in response to said Motion for Rehearing the Supreme Court of Nebraska, on October 13, 1945, ordered re-argument of the motion for rehearing at a session of the Supreme Court of Nebraska commencing November 5, 1945; that re-argument was heard on November 7; Order on Rehearing (R. 376).

That thereafter the State Supreme Court, on March 22, 1946, rendered the decision and judgment now sought to be reviewed by Certiorari. Judgment of March 22, 1946 (R. 376); Opinion of March 22, 1946 (R. 377).

**Decision and Judgment of the Court Below**

The final decision and judgment of the Supreme Court of Nebraska is reported in — Neb. —; 22 N. W. (2nd) 20, and appears on pages 376-7 of the record filed herewith. The original decision of the Supreme Court of Nebraska, which is adhered to in its final decision and judgment, is reported in 146 Neb. 397; 19 N. W. (2nd) 641, and appears on pages 342-355 of the record filed herewith. It is believed by petitioner that comparison and analysis of the two decisions of the Supreme Court of Nebraska in this

cause manifestly discloses such vascillation and incongruity on the part of that court as to effectively make clear and certain its errors of judgment and law in dealing with a case arising under the Federal Employers' Liability Act involving Federal questions and Federal policy, and that the Supreme Court of Nebraska, through lack of full appreciation and understanding of Federal decisions and particularly those of the United States Supreme Court, has committed errors and deprived petitioner of his right and remedy under the Federal Employers' Liability Act and his right to a jury verdict, the injustices of which can now be corrected only on review by the court to whom this petition for a Writ of Certiorari is addressed.

## Nature of Case and Summary Statement of the Matter Involved

This is an action at law under the Federal Employers' Liability Act (title 45, U. S. C. A. Sec. 51, et seq.; Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65, et seq.), instituted by petitioner (plaintiff) against Union Pacific Railroad Company, Respondent (defendant) to recover damages for personal injuries sustained by petitioner on March 15, 1943, while employed by respondent as an engine foreman (switch foreman) of a switching crew engaging in respotting a box car as part of a switching movement then being carried on in the city of Seattle, State of Washington, in furtherance of respondent's business of interstate commerce and interstate transportation as a common carrier by railroad. Suit was instituted in the District Court of Douglas County, State of Nebraska, on August 16, 1943; after issue was duly joined the case came on for trial in the District Court of Douglas County, Nebraska, on June 8, 1944, before the Hon. James F. Fitzgerald, Judge, and a jury, and resulted in a verdict and judgment of Ten Thousand Dol-

lars ($10,000.00) in favor of petitioner (plaintiff). At the commencement of the trial (B. of E.), (R. 27), it was stipulated between the parties that plaintiff was subject to and within the protection of the Federal Employers' Liability Act as amended. In the switching operation being performed, plaintiff, while participating therein in the capacity of foreman, and while on foot, was caught and crushed between the side of a moving box car and the wall of an adjacent building as the box car was rounding a sharp curve in the track. The location and position of the building and the track, with respect to each other, the sharpness of the curve, the length and width of the box car, the fact that when the center of the box car, meaning approximately a point midway between the ends of the car, reached the apex of the curve, the side of the box car came within less than one foot of the building wall. These conditions, coupled with plaintiff's unfamiliarity therewith, and the fact that the danger was not readily observable to an employee engrossed and distracted in his work, as was plaintiff, created an obscure or hidden danger reasonably likely to bring about such an event as resulted in injury to plaintiff, in the absence of timely, adequate and sufficient warning. Plaintiff's petition (complaint) alleged, and the trial court submitted to the jury, in substance, the following issues of negligence.

1. That in the switching operations in which plaintiff was then engaging, the defendant negligently failed to provide and maintain for plaintiff a reasonably safe place of work.

2. That it negligently failed to provide and maintain adequate, safe and sufficient clearance between the track on which it was moving an engine and cars and a certain building or fixed structure near said track.

3. That it negligently moved on said track a certain car which was too large to safely move on said track and

that said car * * * bulged to such extent as to greatly lessen the clearance between the bulging side of said car and said building or fixed structure.

4. That it negligently and carelessly failed to maintain its said tracks in reasonably safe condition and permitted the same to be rough, uneven and unstable, and permitted low joints to exist therein, all to such extent as to cause said car, while in motion, to list, sway, pitch and lurch in the direction of said building or fixed structure, thereby greatly reducing the clearance between the side of said car and said building or fixed structure.

5. That it negligently and carelessly moved said car in the direction of and past said building or structure * * * and that it failed to exercise reasonable care for the safety of plaintiff, either by keeping a proper lookout, or otherwise, and that it negligently and carelessly failed to warn plaintiff of the danger to which he was subjected while in a position he was necessarily occupying in such switching operations. (Paragraph VIII of Petition, R. 3.)

The above are quotations from the plaintiff's petition (complaint).

The trial court, by its instruction No. 1, restricted the issues of negligence as follows:

> "(a) Plaintiff alleges that the said squeezing caused him severe and permanent injuries and alleges that said injuries were caused by the negligence and carelessness of the defendant company.
>
> "(b) He alleges that defendant failed to provide plaintiff with a reasonably safe place to work and alleges that it failed to provide adequate and sufficiently safe clearance on the track on which it was moving an engine and cars, and the building structure near the said track.

"(c) Plaintiff alleges that the defendant was guilty of negligence in moving the car which came in contact with plaintiff, in that the said car was too large to safely move on said track.

"(d) He further alleges that the defendant negligently and carelessly failed to maintain its said tracks in a reasonably safe condition and permitted the same to become uneven, and permitted low joints to exist therein, which plaintiff alleges caused the car, while in motion, to list in the direction of the building, and alleges that that greatly reduced the clearance between the side of the car and the said building.

"(e) He further alleges that defendant negligently failed to warn plaintiff of the danger to which he was subjected while engaging in the switching operations, and

"(f) Alleges that he was necessarily, in the performance of his duties, in the position in which he was at the time of his injuries."

(Instruction No. 1) (R. 9-11.)

The able trial court fully, fairly and clearly instructed the jury on negligence and contributory negligence, and the responsibility of a common carrier by railroad for the negligent acts and omissions of its officers, agents or employees, *et cetera*. (Instruction No. 7.) (R. 13.)

And with respect to negligence of defendant's locomotive engineer, instructed:

"If you find from a fair preponderance of all of the evidence that defendant's engineer, who was operating the locomotive shoving the car in on the Casein Spur Track, knew, or in the exercise of ordinary care should have known and discovered that plaintiff was in a position of peril, and that the engineer, in the exercise of ordinary care could and should have avoided injuring plaintiff, and you find from a preponderance of the evidence that the engineer negligently failed to do

so, then it would become your duty to find a verdict in favor of the plaintiff."

(Instruction No. 12) (R. 15). In connection with the above instruction it should be noted that Instruction No. 9 (R. 14) provides for reduction of damages by virtue of contributory negligence on the part of plaintiff.

There was substantial evidence of negligence on the part of defendant which was a proximate cause of plaintiff's injury in at least three particulars, namely:

(a) Failure to provide and maintain for plaintiff a reasonably safe place of work.

(b) Failure to instruct and warn him against the dangerous trap in which he was caught.

(c) Negligence on the part of the locomotive engineer.

For a comprehensive understanding of the essential facts, and to demonstrate the inaptitude of the Supreme Court of Nebraska and its errors in failing to determine Federal questions in accordance with Federal rules in the case at bar, we call to the attention of the Court the following facts and circumstances surrounding the occurrence of the injury to petitioner (plaintiff), and the substantial supporting evidence: at the trial it was stipulated and agreed that plaintiff's Exhibit I is a plat of the scene of the accident, correctly prepared according to a scale of one inch to twenty feet; that the measurement of distances which are shown upon the Exhibit in figures are substantially correct, being within an inch or two of the actual distances existing on March 15, 1943 (date of the injury), and that the track shown leading from and to the west of the Casein Co.'s Spur Track was not connected with the Casein Spur on the day of the accident, and was not then, nor for many years prior thereto, in use; that the plaintiff

did not, by offering the plat in evidence, admit that the "impaired clearance sign" shown on the plat was in the position so shown on March 15, 1943.

*Newton W. Ellis*, plaintiff, aged 42 years, resided at Port Orchard, Washington, 18 miles from the city of Seattle, and had been in defendant's employ since April, 1942. He had completed eighth grade and had about one year in high school, following which he engaged in farming, and followed the trade of a plasterer for about fifteen years; about the year 1922 or 1923 he was employed by Southern Pacific as a brakeman for about one year. Aside from this he had no other railroad experience until employed by defendant. (B. of E. qs. 7-34), (R. 28-30). He was employed by defendant as a brakeman and switchman at Seattle, Washington, from the beginning, working first in the Argo Yards, switching box cars in connection with making up and breaking up trains. At the time he was injured, he was engaged in industrial work outside of the Argo Yards, which consists of picking up loaded cars or taking empty or loaded cars to industries, and first engaged in such industrial work in the summer of 1942 as a helper switchman. (B. of E. qs. 34-37). (R. 30).

He was engaged on different shifts at various times while he was a helper and engine foreman, starting with a night shift while on the extra board, and was promoted to engine foreman in February, 1943; and on the day of the accident was on a shift which started to work at 4:00 o'clock in the afternoon. Prior to the day of the accident, he had never worked either as a foreman or helper in on the Casein Spur Track, shown on Exhibit I, and was not familiar with the clearance between the Casein building and the side of the cars rounding the curve in the Casein Spur Track. (B. of E. qs. 48-61.) (R. 31-32.)

Specifically, he testified as follows:

"Q. Prior to March 15, 1943 had you, either as a switchman or as a switchman's helper, ever worked in on the Casein Spur Track, shown on that Exhibit, (Exhibit I.)?

A. No.

Q. Well, what is the fact, Mr. Ellis, as to whether or not prior to the time of the accident, you knew or had any knowledge of what the clearance was between the Casein Building and the Casein Spur Track?

A. No.

Q. Prior to the time you were injured, what is the fact as to whether or not you had any knowledge of the degree of curvature in the Casein Spur Track?

A. No. (R. 31-32).

To thoroughly understand the situation and the circumstances under which plaintiff met with injury, reference is made to the plat (Exhibit I), which shows the *locus in quo* and surrounding territory. Myrtle Street, shown on the plat, runs in a general easterly and westerly direction; Myrtle Street Track occupies a part of Myrtle Street and runs in a general easterly and westerly direction; the Casein Spur Track comes off the Myrtle Street Track from the northeast across Myrtle Street and follows along the westerly side of the Casein building, which is on the south side of Myrtle Street, and immediately east of the Casein Spur track; a portion of the westerly wall of the Casein building consists of diagonals instead of a straight wall; the Casein Spur track curved sharply around this diagonal wall; an engine or cars moving in on the Casein Spur Track would proceed in a general southerly direction; an engine or cars moving out of the Casein Spur Track would proceed in a general northerly direction; to get either in or out of the Casein Spur Track it was necessary for the engine and any cars which might be attached thereto to move east a suffi-

cient distance of the junction point and switch of the Myrtle Street Track and the Casein Spur Track because the Casein Spur Track came off the Myrtle Street Track.

Prior to the day of the accident, which occurred about 7:00 o'clock P. M. (war time), plaintiff had never worked in on the Casein Spur Track, either in the capacity of helper switchman or engine or switch foreman, and had never been warned, notified or instructed of and against the obscure danger spot where he was caught, crushed, squeezed and injured between the side of a box car and the wall of the Casein building, as the box car was rounding the curve of the Casein Spur Track. During the afternoon of the day of the accident plaintiff had been instructed by yardmaster Ross to pick up a load in the Casein plant; the crew, of which he was foreman, consisted of the engineer, G. J. Buzard, the fireman (name unknown), switchman helpers J. C. Brown and Edwin P. Field. The first work done by the crew was to obtain some loaded cars from the Boeing plant, which was approximately one mile or more from the Casein Co. plant; after leaving the Boeing plant the cars there obtained were left on a passing track and the crew proceeded with the engine only down to the Casein Co., coming in on the track designated on the plat as the "Fox Avenue Track," which connects with or is a continuation of the track shown on the plat as the "Myrtle Street Track," the connection being made with a switch shown upon the plat and identified by plaintiff with the letter "E". The engine was headed east after it reached the Myrtle Street Track about 7:00 P. M., (war time), at which time plaintiff was riding the rear footboard and got off the locomotive when it came to a stop at switch "E". (B. of E., qs. 62-101). (R. 32-35). He then walked south toward the loading docks on the west side of the Casein building to determine which of the two cars then on the Casein Spur Track was to be taken out, following the

course shown on the plat (Exhibit I) by the dotted line extending from letter "A" near switch "E" to letter "B". (B. of E., qs. 103-109) (R. 35-36), and upon arrival ascertained from examining tag affixed to side of the car that the car to be taken out was the second or most southerly car of the two. Whereupon he signalled for the engine to back in on the Casein Spur Track, couple into the first car and then the second (cars were standing some distance apart), and while that movement was being made plaintiff stood beside the track, but did not remember whether this was the east or the west side. (B. of E., qs. 110-115) (R. 36). The engine, with the two cars attached, then pulled out of the Casein Spur in a northeasterly direction and into the Myrtle Street Track and then west on the Myrtle Street Track far enough to get beyond the curve (shown in the track on Exhibit I), for the purpose of getting on straighter track, as cars do not uncouple very well on a curve. Plaintiff did not remember who gave the signal to pull off the Casein Spur. (B. of E., qs. 116-125) (R. 36-37). After the engine and two cars had moved west along the Myrtle Street Track it was Ellis who uncoupled the westerly car from the one left attached to the engine and he walked to this point on the westerly side of the Casein Spur track. After this uncoupling was made on the Myrtle Street track it was necessary to pull east on that track far enough and over the Casein Spur switch so that the car attached to the engine could be respotted in on the Casein Spur opposite the first loading platform of the Casein building. After uncoupling the car on the Myrtle Street track preparatory to respotting the other car back on the Casein Spur track, Ellis walked to the point "XW" (see plat, Exhibit I) for the purpose of flagging the Myrtle Street crossing, (formed by Casein Spur track running over Myrtle Street), and as no cars (automobiles) were coming along Myrtle Street, walked to

the point "XY", (See plat, Exhibit I), on the easterly side of the Casein Spur track for the purpose of passing signals. (B. of E., qs. 134-141). (R. 38).

Petitioner then testified as follows:

"Q. Why did you take that side to pass signals?
A. It is the side the crew works on, the engineer's side.
Q. Was that the usual and customary side to work on in passing signals?
A. Yes."

(B. of E., qs. 142-43). (R. 38-39).

After crossing to the position indicated plaintiff testified as follows:

"Q. After you crossed the track and got over onto the east side of the Casein Spur track, did you make any observations to see the engine?
A. Yes.
Q. Just tell us what you did and how you did it.
A. I looked toward the engineer and looked to see Mr. Brown, to see where he was.
Q. Well, when you looked in the direction of the engineer, what *what* was he doing?
A. He was watching me.
Q. Then you say you looked in the direction of Mr. Brown?
A. Yes.
Q. Where was Mr. Brown supposed to be?
A. He was supposed to be at the loading platform, that is, the first one."

(B. of E., qs. 151-157) (R. 39-40). (The loading platform referred to is the first platform of the Casein building coming in on the Casein Spur, and is shown on the plat, Exhibit I; this being the platform where the car which was being shoved in by the engine was to be spotted.)

Plaintiff then testified as follows:

"Q. Why were you looking to see where Mr. Brown was?

A. I wanted to see if he was at the platform or not to pass signals.

Q. Was it part of your duty or not to give Mr. Brown signals, or be in a position to either give or take a signal from Mr. Brown?

A. Yes, that is right.

Q. Was it also your duty to be in a position to be able to either give a signal to the engineer, or to transmit a signal that you might get from Mr. Brown?

A. Yes, that is true.

Q. Now, then, after you crossed the Casein Spur track for the purpose of being in position to either give or take signals, do you recall whether or not you moved for some distance either to the south or north?

A. I do not recall. I moved a few feet in there . . . yes, toward the south.

Q. Why did you do that?

A. To get a better view.

Q. To get a better view of what?

A. To see if I could get a better view of Brown. It is on a curve.

Q. While you were in that position between the Casein Spur track and the Casein Co. building, what happened?

A. Well, I looked to see Mr. Brown, and I could not see him, and the end of the car went past, and just as I looked back toward the engineer, the middle of the car caught me.

Q. The front end of the car, when that went by, did that clear you in good shape?

A. Yes. If it had not, it would have pushed me out of there.

Q. How much of the car got by you before you got into trouble?

A. About half of it.

Q. Up to the time that car came in contact with you, did you know that you were either in a place of danger or where there was insufficient clearance?

A. I didn't know it."

(B. of E., qs. 159-68.) (R. 40-41.)

Reference to the plat, Exhibit I, discloses that the place where plaintiff was caught and crushed between the side wall of the Casein building and the middle of the box car was at the point of narrowest clearance between the easterly rail of the Casein Spur track and the side of the building. This point of narrowest clearance extended along the building wall for a distance of approximately one foot; this point was directly opposite the apex of the curve. It was the single spot between the track and the building in which such an accident could occur; it could occur probably only with a box car of the width and length of the one here involved, 50 ft. 6 in. long, and 10 ft. 7 in. wide, this being about as large a box car as was operated on defendant's system. (R. 229-30.)

It was when the center of this large box car reached the apex of the curve that the side of the box car so crowded the wall of the building as to trap, crush and squeeze plaintiff between the side of the car and the building, causing him to be wedged in there so tightly that an indentation was made in the corrugated metal wall of the building at a point above the ground about level with plaintiff's chest and shoulders, inflicting severe injuries with fractures in the upper half of his body. Measurements made after the accident indicate that the clearance between the side of the car and the Casein building at the point where plaintiff was injured was about 10 inches. (R. 231.)

*Melburn H. Estes,* General Yardmaster of Union Pacific Railroad Co. over a period of years, including March 15, 1943, testified that he was familiar with the Casein Spur

track for the past ten years, had worked there as a brakeman or switchman, and had supervision over the engine foremen; that he was acquainted with plaintiff and had recommended his promotion as an engine foreman; that he had supervision over the Argo Yards; that the Casein Spur track was within defendant's switching district; that he had nothing to do with supervision over the track since that is a matter handled by the Roadmaster, (R. 224); that no change had been made in the location of the track, to his knowledge, within a period of ten years, (R. 228); that when repairs are required to the Casein Spur track the work is done by Respondent's section crew; that any car moving around the curve on that track gets closer to the side of the building as it rounds the apex of the curve, and a 50 ft. car would come closer than a 40 ft. car, (R. 236-37); that it is characteristic of all cars on all curves to overhang the greatest in its center, in the inside of the apex of the curve. (R. 237.)

*H. B. Coburn,* Assistant Superintendent of Respondent at Seattle over a period of 12 years at Seattle, and so employed at the time plaintiff was injured, had supervision over the yardmasters and indirect supervision over the roadmasters; that he had been familiar with the Casein Spur track and the clearance between the track and the building over a period of 12 years and recalled that the Casein building was constructed on the site formerly occupied by the Fox River Butter Company, following the time that the Butter Company building was burned; did not recall that any change was made in the location of the Spur at that time. (R. 238-40.) That tracks in zone 5 (Casein Spur track in this zone) were under his supervision with respect to operation, and under the supervision of the roadmaster with respect to maintenance, the yardmaster having no responsibility in connection with maintenance except to report defects. The section men are under the supervision of the roadmaster. (R. 240.)

*J. C. Brown*, helper switchman and member of plaintiff's crew on the day of the accident; had worked with plaintiff the day before the accident and on three or four prior occasions; however, the day of the accident was the only time that this witness had any recollection of working on the Casein Spur with any switching crew of which plaintiff was a member. (B. of E., qs. 2333-43), (R. 203-204), (B. of E., q. 2380), (R. 207.) Brown had been working on the same shift for a period of about three or four months prior to the time of the accident, during which he had occasion to be working on the Casein Spur on an average of two or three times a week. Prior to the start of the movement being made, at the time plaintiff was injured, this witness had walked in on the Casein Spur to the first loading platform of the Casein building, a distance of about 100 feet from Myrtle Street, for the purpose of spotting the car at the first loading platform. The front end of the Casein building is about 15 feet south of the south edge of the pavement of Myrtle Street, and the Casein Spur track crosses Myrtle Street in a southwesterly direction and curves around the building. The first loading platform extends out about a foot. (B, of E., qs. 2344-66.) (R. 204-206.) While the movement was being made, Ellis was in a position between the witness and the engine, which was backing in, making the movement with the box car coupled to the tender. Witness was standing at the door of the first platform on the east side of the track, but could not see either plaintiff or the engineer from this position. He had assisted in doing similar work on this track, and having observed plaintiff on the engineer's side when the movement was started, and not having received any instructions from plaintiff that he would work on the other side, assumed that plaintiff would be working on the engineer's side of the track. (B. of E., qs. 2367-80.) (R. 206-207.) With an engine backing in on the Casein Spur track,

the engineer's side of the engine is that side of the engine which is next or nearest the Casein building; so plaintiff, in working on the engineer's side, was working in a position between the Casein building and the Casein Spur track. Brown, while standing at the first door of the Casein building, at the first loading platform, and watching the end of the car come toward him, observed the car come to a stop, and hearing someone holler, knew something was wrong so walked between the car and the building and found plaintiff pinned in between the car and the building, facing him in an upright position, squeezed so tightly that he could not get his hand between the car and plaintiff's shoulder to work him free, so he called to the engineer to pull up ahead toward Myrtle Street. From his position on the south side of plaintiff he could see the engineer. There was an indentation in the side of the building where plaintiff was caught which was about five feet above the ground and appeared to have been made by plaintiff's shoulders. Plaintiff was caught about the center of the car. It was necessary to move the car to extricate plaintiff. Brown was fearful that if the car was moved further back (south) that it might injure plaintiff more seriously, although the clearance became wider south of that point, but was also wider "the way he (Ellis) walked in and I thought the logical thing to do was to roll him out the way he walked in." It appeared to Brown that plaintiff was caught at the point where the clearance was narrowest between the building and the side of the car, which was due to the fact that the car was rounding a curve. When the car was pulled ahead, plaintiff was turned half the width of his body and possibly two or three inches farther. When he first reached the plaintiff, the car was standing still; in order to release plaintiff, it was moved forward about 14 inches toward Myrtle Street and then rolled back a distance of three or four inches, at which time Brown, with the help

of Field, the other switchman of the crew, was able to release plaintiff, who was then laid on the ground. (B. of E., qs. 2424-34-35-59.) (R. 212-216.)

**Usual and Customary to Work on the Engineer's Side of the Casein Spur Track**

*G. J. Buzard,* locomotive engineer of the engine moving the box car at the time plaintiff was injured, had been in the employ of Respondent at Seattle for approximately 29 years as a locomotive fireman and engineer, and had been employed as engineer in the Argo Yards for about three years immediately prior to plaintiff's injury, and in the capacity of fireman and engineer had worked on the Casein Spur over a period of 18 years. (H. 169-170-172.) That Ellis was working on the proper side of the Casein Spur track, that is, between the Casein building and the track, in the work in hand at the time he was injured, is emphatically and decisively established by the following testimony of the engineer Buzard:

> "Q. Can you tell us whether or not Mr. Ellis was working on the customary side in respect to the movement you were making at the time of the accident?
>
> A. Well, all I can say about that is that previous to this accident and including all of the time I was firing an engine I never saw a man work on the other side of the engine. He always works on the engineer's side.
>
> Q. In on that Casein Spur track?
>
> A. Oh, I would say maybe once or twice they have worked on the fireman's side since then, but most always they worked on my side."

(B. of E., qs. 2257-62.) (R. 196.)

**Negligence in Failing to Give Timely and Adequate Notice and Warning of the Danger Point on the Casein Spur Track**

It has already been pointed out that Ellis had but little railroad experience; at the time of the accident he had been a switch foreman for only about a month, and the day of the accident was the first time that he had ever worked in or about the Casein Spur track in the capacity of a switch foreman; he had no knowledge, notice or information as to the dangerous and hazardous condition which existed at the one point on the Casein Spur track where such an accident could happen; he had received no warning, notice or instruction of any kind, either from the engineer of the crew or any other member. None of his superiors ever warned or instructed Ellis in respect to the existing conditions which created a dangerous trap at this particular spot. Except for the spot where plaintiff happened to be standing at the time he was caught, there was sufficient clearance to avoid injury to a person between the side of the building and the box car moving along the track. This dangerous spot covered a space of approximately one foot in width. In order for plaintiff to be caught it was necessary that he be at this precise spot at the time the center of this large box car came up to him. Had he been at a point either a few inches north or south of this particular spot he would not have been injured. To catch an employee engrossed in his work it would have been difficult to devise a more effective trap to accomplish such purpose. In considering this phase of negligence it should be borne in mind that defendant was chargeable with knowledge of this condition; it had operated and maintained this track for many years; there was plenty of available space either to modify the curve or to move the track a few inches, and much more, away from the building; there was no

showing of necessity for maintaining such a trap. If such a trap was unavoidable, the imperative duty to give adequate warning of the danger existed.

(B. of E., qs. 414-17-23-24-25.) (R. 63-4.)

**Negligence of Engineer**

Engineer Buzard up to March 15, 1943, had behind him nearly 29 years' experience as a locomotive fireman and engineer in the service of Respondent, and during that period had operated on the Casein Spur many times over a period of 18 years. He admitted that he was thoroughly familiar with the location of the Casein building with reference to the spur track; knew that the spur track was "a dead end track"; knew that the Casein Spur track was located rather close to the Casein building and that as that track approached and came around the westerly side of the building and in a southerly direction, that the track had quite a sharp curve; that he could not recall any other track that was as close to a building or fixed structure as was the Casein Spur. (R. 172-3, 177.) He knew that as he moved the box car over the curve in the track that some part of the side of the car would get closer to the building. This is illustrated by his testimony, as follows:

> "Q. Do you know whether or not with a 50 ft. car some part of the side of the car would get closer to the building than it would with a 40 ft. car?
>
> A. Yes, sir.
>
> Q. And what is the fact as to that?
>
> A. What do you mean, fact?
>
> Q. Well, would the 50 ft. car, some portion of it, get closer to the building rounding that curve than some part of the side of a 40 ft. car?
>
> A. Well, as I say, yes, the 50 ft. car would naturally crowd the diameter of a circle more than the 40 ft. would.

Q. The sharper the curve is, would that bring some portion of the side of the car closer to the building?

A. Yes, I think my previous answer would be the answer to that, wouldn't it?

Q. That is what I want to know, I want to get your answer and not any suppositions.

A. Yes.

(B. of E., qs. 2193-2197.) (R. 189.)

Later he attempted to qualify the effect of the above testimony by claiming that he did not become aware of such facts until after the accident to Mr. Ellis, notwithstanding his many years of railroading, during which time he had shoved and pushed many box cars around various degrees of curves. He admitted, however, that when shoving a car either on straight track or curved track, if looking in the direction of the movement he could see the side of the car on straight track; that he could also see the side of the car as it was rounding the curve, but, of course, could not see that part of the car which got beyond or behind the curve; but admitted that he could see at least half the length of the car. (Note: The engineer's side of the engine was on the inside of the curve, so it is obvious that as long as he could see Ellis he could also see that the side of the car was crowding and converging in the direction of Ellis and the building wall.) He further testified as follows:

"Q. Well, you have already told us your eyesight was good and you were keeping a vigilant lookout ahead.

A. Yes.

Q. But when you saw Mr. Ellis you could also see the car within range of your vision, could you not?

A. Yes, the car was within range of my vision. I saw it until part of it went by and the other part I could not see. That was around the curve."

In operating the engine he was riding within the cab on the engineer's side looking out of the side window. He testified further:

"Q. Looking out of the side window you could see Mr. Ellis?

A. As I say, just half or two-thirds of his body standing there around this little curve.

Q. Well, you could see the upper part of this body?

A. Yes, sir.

Q. His arms?

A. I do not remember it. As I recall, I cannot say I remember exactly his arms. I do not recall that.

Q. Well, as a matter of fact, you could see his head and body and legs and feet, could you not?

A. Yes, sir, that is, that side of him.

Q. As a matter of fact, you could see the whole of him.

A. That is what I was looking at . . . the whole of him . . . Well, not at all of him, the right side of him, more or less the right side, whatever I could see of that side, because he kind of had his back partially to the building, understand?

Q. You could see his face?

A. Only when he turned around a couple of times and looked to see if I was still in sight."

(B. of E., qs. 2225-2230.) (R. 192-193.)

In describing the manner in which the accident occurred the engineer testified:

"Q. Well, now, you kept your eye on Ellis from the time you started to shove in on the Casein Spur until he was hurt. What was he doing?

A. Well, he was standing in the . . . well, first he walked in a ways, as I recall it, he walked in a ways, half a car length in there, and then he stopped and every once in a while he would look back and see if he could see me to be sure he would not get out of my sight because the rules say the minute he gets out of my sight

I stop. That is a stop signal, so I kept crawling back in there and watching him all the time, and the first thing I knew I saw his right foot twisted on the ground and I stopped right there, but that was not supposed to be and I could still see all of his body.

Q. You could still see all of his body?

A. Yes, sir.

Q. Now, before anything happened to Mr. Ellis, had part of the car got by him?

A. It had to because he was caught in the middle of the car.

Q. But I am asking you now about what you saw. Did you see the front end of the car?

A. No, I was not paying any attention to that at all. I was just looking at him. I never even looked at the car at all. I was just looking at him.

Q. But in looking at Mr. Ellis you could not help but see the car?

A. Well, naturally, you could see the car going by him, if you want to put it that way, but naturally I was looking at him.

Q. Well, in looking at him you did see part of the car go by him?

A. Well, I think you sense that more than you see it."

(B. of E. qs. 2211-2216.) (R. 191.)

*Exhibit 14* (R. 248A). A certified copy of the Monthly Met-orological Summary of the United States Department of Commerce Weather Bureau at Seattle for the first 15 days of March, 1943 shows that the sun set on March 15 at 6:14 Pacific Standard time, or 7:14 Pacific War time.

Engineer Buzard had a commanding view of what was going on ahead. He was an experienced engineer and had operated on the Casein Spur track many times over a period of 18 years. During the particular movement we are here concerned with he observed the plaintiff at all

times, and that was his duty in the movement such as was being made.

*Exhibit 2* (R. 56A) is a picture taken of the side of the Casein building, with the camera facing south, showing a portion of the Casein Spur track and a part of the abandoned track leading therefrom. The white spot in the picture is a sun spot near the indentation in the wall of the building, which is the point where plaintiff was standing at the time he was injured. (R. 55.)

*Exhibit 3* (R. 58A) is a picture of the Casein building, with the camera facing north and a little bit east, showing Myrtle Street as a white streak in the background ahead of a car of lumber, which was not in that position on the day of the accident, showing plaintiff in the position which he was occupying at the time he was injured, and also showing a portion of the Casein Spur track and the abandoned track in the left foreground, the picture being taken at the same time as Exhibit 2, in the month of April, 1944. (R. 57-8.)

*Exhibit 4* (R. 59) is a photograph taken at the same time with the camera facing southwest, showing a portion of the wall of the Casein building and a part of the Casein Spur track, and also a part of the Continental Can Co. building in the background. The relationship of the tracks to the building, as shown in the photographs, was the same at the time of the accident. (R. 61.) Exhibit 40 (R. 326A), Exhibit 41 (R. 328A), and Exhibit 42 (R. 328-B) were photographs taken by Respondent a few days after the accident; Exhibit 43 (R. 332A) is a picture taken at the scene of the accident December 3, 1943. Exhibit 40 shows substantially, or approximately, the position of the box car at the time plaintiff was released after the accident. When this picture was taken the camera was north of Myrtle Street

and pointed toward the car. (R. 325-6.) Exhibit 41 shows the south end of the car on the Casein Spur track in the same position as Exhibit 40, taken with camera facing generally to the north. (R. 327.) Exhibit 42 is a view of the same car while in the same position, showing the north end of the car and taken with the camera facing generally to the south, the camera being about four or five feet above the ground. (R. 327-8.)

These photographic exhibits, when considered from the standpoint of what view the engineer had, would be deceptive unless considered in connection with the plat, (Exhibit 1.), and the position of the engineer looking out of side window of the engine cab. The evidence fully warrants a reasonable inference that the engineer could and should have observed the side of the car crowding in the direction of plaintiff; that the engineer could and should have known that plaintiff was in a position of danger and unaware of it; that the engineer should have halted the movement and warned plaintiff; that the engineer, in the exercise of ordinary care, could and would have avoided this accident.

*Evidence Favorable to Defendant.* While it is believed by petitioner that the summary of facts contains all that is essential to a review of the judgment of the state court, petitioner, in fairness to this Court, and also to defendant, calls attention to some additional evidence which discloses that at most there were some conflicting issues of fact which might justify a jury, as triers of fact, into inferences favorable to defendant; also that to draw the proper inferences the jury, and not the court, should weigh the evidence and pass upon the credibility of the witnesses.

Defendant claimed that at the time of the accident there was in existence and in position an "impaired clearance sign" located at a point between the easterly rail of the Casein Spur Track and the northwesterly corner of the

Casein Co. building. The claimed location of this sign is indicated on the plat, Exhibit 1.

*Engineer Buzard* testified that the company maintains a sign there year in and year out, ever since he can remember, "and it says 'impaired clearance' on it" (R. 185). He last observed the sign two days before his deposition was taken (March 7, 1944), at which time it appeared like all the rest of the signs, which are kept well painted; that the sign was located on the east side of the track near the corner of the Casein building, and is about eight feet above the ground (R. 185-6). His construction of 'impaired clearance' was that it meant 'look out,' and "it would mean under standard clearance" (R. 194).

*J. C. Brown* testified that the "impaired clearance sign" shown on the plat, Exhibit 1, a year after the accident, is the same sign which he said was present the day the accident occurred. Brown further said, "I could not swear that that was the same sign, but I personallly think it is the same sign" (R. 222).

*Melburn H. Estes,* general yardmaster of defendant. This witness testified by deposition March 7, 1944, and also appeared and testified at the trial (R. 222-238, 322-341). He testified that the clearance sign, which is shown in Exhibit 11, (R. 124A), was in the same location as is shown, and over a period of ten years had been in the same location since he became general yardmaster, and that the signs are maintained and painted from time to time (R. 323-4).

*H. B. Coburn,* assistant superintendent of defendant, said there was a standard sign lettered either "restricted clearance" or "impaired clearance;" that the sign had been in existence for a period of several years prior to March 15, 1943, the day of the accident; that no change had been made, to his knowledge, with respect to either the location

or lettering of the sign following the accident; the signs consist of a rectangular board aproximately 15 inches x 28 inches, painted white with black lettering, erected on a post with the lettering 2½ in. to 3 in. in height, affixed to a post about 4x4 set in the ground, similar to a fence post. He did not believe that the company kept any record when the posts are replaced in case of deterioration, and did not know whether the posts were treated or painted; admitted that the soil in the vicinity of the Casein plant could be damp and moist and that weather causes a rotting condition in all wood; was uncertain whether the company had any standard with respect to the height which the sign should be above the ground or working level (R. 241-2).

*Keith Murphy,* witness for defendant, testified that "the impaired clearance sign which is shown in photograph, Exhibit 11, appears to be the same as the impaired clearance sign which was in the same position when he worked there during the summer and fall of 1942" (R. 308). A comparison of photographic Exhibits 11, 40, 41, 42, 43, 44 (R. 124A-326A) with the plat, Exhibit 1, is necessary in order to avoid deceptive location of the impaired clearance sign (if it was there at the time of the accident) because the plat demonstrates that the position of this sign was approximately 7½ feet west of the north side of the Casein building and approximately between 30 and 40 feet from the point where plaintiff was injured.

*Plaintiff's Evidence as to the Sign.* Mr. Ellis at no time prior to being injured had ever observed the impaired clearance sign, nor had anyone ever called his attention to it; he first observed the sign during the month of August, 1943, at which time it appeared like a new sign • • • the paint was fresh, there was no rot about the post or standard, and the bolts appeared like new bolts. The sign

was painted white with lettering in black and was not dirty. There was no grass but only plain dirt within an area of a foot or so around the base of the pole. The rainy season in Seattle extends from October to about the first day of May (R. 125-128).

*Donald H. Christensen.* This witness was formerly in the employ of defendant as a switchman and brakeman in the Argo Yards at Seattle; had worked in and about the Casein Spur and was familiar with that location and the general condition of the ground, the tracks and the ties of the Casein Spur Track (R. 146-7). Also employed approximately a week to ten days before Mr. Ellis was injured (March 15, 1943), and was there again about a week after the accident. He testified as follows:

> "Q. On these occasions that you worked *in* on the Casein Spur Track in March, 1943, can you tell us what the condition of the ground was in there, and the condition of the tracks and ties of that Casein Spur Track?
>
> A. Well, the ground is damp, the grass is 'pinnear,' always wet there unless the sun happens to shine. Outside of that it is quite murky, not a real solid bottom to it." (R. 147.)

With respect to the condition of the track and ties along the Casein Spur, he testified:

> "A. Well, you have tracks there narrower than the others . . . the rails themselves, I mean. The rails have been in there a long time. They do not seem to be too solid and some parts there were higher than the others.
>
> Q. Had you observed cars moving in and off the spur track?
>
> A. Yes, I have.
>
> Q. Tell the Court and jury what you observed with respect to the action or movement of the cars as they were moved in and off of that Casein Spur Track where it runs along the Casein building.

A. Well, of course, when you are head brakeman or pin puller you stay out of the switch. Of course, that means, when the car is going into the Casein Spur you would naturally observe it or watch it back in. Well, it rocks back and forth, the engine and car also, seeing that the track is rough, . . . and that the cars would do that even when being moved at a slow rate of speed in and off that track." (R. 147-8.)

During a period of three months preceding the accident this witness had been in and about the Casein Spur three or four times; was there probably a week or ten days before Ellis was injured, and was in the vicinity of the scene of the accident about a week after plaintiff was injured (R. 147). He further testified that the rainy season in Seattle extends from about December 1st until the latter part of April, and there was normal rainfall during the month of March up to March 15; that he had on some occasions observed cars moving in or off the Casein Spur Track to have a tendency to lean toward the Casein Building. He recognized defendant's Exhibit 11 as a photograph of the surroundings shown and, first observed the "impaired clearance sign" shown in the picture sometime in the month of May, 1943; that he had not observed the sign during the month of March, 1943, nor had his attention been called to such a sign at that time; that when he first observed the sign, it appeared the post was new and the ground surrounding it had been freshly turned; dirt had been tamped around the base of the pole, and the sign was newly painted, and the bolts did not show any signs of rust (R. 148-151).

There was some precipitation on March 12 to March 15, inclusive, as shown by the U. S. Weather Bureau records in Seattle. Witness Brown testified that this whole industrial site is part of the tide flats in South Seattle and is

what "I would call low and it has been filled in" (R. 211), Exhibit 14, (R. 248-A).

Defendant's yardmaster Estes admitted that "there is always less motion in a car when it is being run on a firm, level track than there is when it is being run on an uneven track with low and high joints" (R. 230).

Defendant's witness Keith Murphy testified that about two weeks before the trial of the case he was asked, while in Seattle, by Mr. Peterson, a claim agent for defendant, if he recalled the presence of the "impaired clearance sign." He had previously talked about the clearance sign shortly after he learned that plaintiff was injured, and when some member of his crew asked him if there was a sign there. He had never made any close observation of the sign, but at the time he talked with the claim agent he did not go to the scene of the accident or examine any photographs and cannot determine from the photograph, Exhibit 11, whether the sign is new or old (R. 308-310). He also testified that when a sign in that area is up for a number of years, it becomes weather beaten, and the paint would fade some, and he has observed old signs which had become rather indistinct. There is considerable rain and fog and dampness during the winter and spring months, and Puget Sound, which is salt water, is about two miles distant from the Casein plant, but he had not observed that such atmospheric conditions were hard on paint (R. 310-11). That the impaired clearance signs throughout the industrial district are placed on a level with a man's eye when he is standing on the step of a car, which would be about eight to nine feet from the ground (R. 311).

The westerly rail of the Casein Spur Track was at a higher level than the easterly track; this would cause cars to list in the direction of the building; defendant's yardmaster Estes testified that it is characteristic of railroad tracks that the rail on the outside of the curve is higher

than the rail on the inside of the curve; that such elevation would cause a car being moved in on the track to list toward the building, and if the tracks were uneven, having high and low joints, there would be side sway and lurching of a car, the extent depending upon speed and whether or not the track was firm and level (R. 230-31, 236-7).

Defendant, through its witness Keith Murphy, introduced various industrial records, Exhibits 15 to 39 inclusive. (R. 249-308). Similar records identified as Exhibit 20-a, Exhibits 45-46-47 were identified by defendant's yardmaster Estes. These were also industrial records. The purpose of introducing these records was to show that the plaintiff had worked with various switching crews in or about the vicinity of this industrial track more frequently than plaintiff himself had recalled. These occasions arose in the summer and fall of 1942, approximately six months or more before plaintiff met with this accident on the Casein Spur Track. The purpose of this evidence undoubtedly was to charge plaintiff with knowledge of the impaired clearance sign as well as knowledge of the narrow clearance. Plaintiff, however had testified that in working in the industrial district the full crew did not always accompany the engine into each and every industrial track. Some of this work was done at night. Of the various industrial records introduced, very few show that any cars were set in on the Casein Spur Track and these records did not show what the plaintiff was doing in respect to any such movements; there is no evidence that so large a box car was ever set in on that track, while plaintiff was one of a switching crew engaging in the work. At most, defendant's evidence was vaguely impeaching of plaintiff's credibility.

*Witness Brown* also testified as follows:

> "Since that accident has happened I am still working with that same engineer, and that has come up at times

about his getting hurt there, and when we go up there with a new man that is the first thing we tell them, about the curve in there, because Newt got hurt in there. That is sort of a jinx because everyone is careful switching in there." (B. of E., Q. 2513), (R. 221).

This testimony persuasively shows that defendant had knowledge of the danger and that there was necessity for warning.

Defendant's witness *Murphy* testified in respect to the industrial record and said:

"That he had different helpers and worked on the Casein Spur when Ellis was not a member of the crew; that the industrial records merely showed part of the work the crew does while working on any particular shift; that if he had not seen the industrial records it would be impossible for him to remember the number of times he had been in on the Casein Spur." (R. 307).

Defendant's yardmaster *Estes* testified that there was considerable open space on the westerly side of the track (R. 227). (Note: The extent of this open space is shown by plaintiff's Exhibit 1, the plat.) Also that the Casein Spur Track is in zone 5 and was taken care of by Union Pacific section men, and that this had been the practice for many years (R. 236).

*Petitioner Ellis* testified that signals for the movement made at the time of the accident could not be given to the engineer from the west side of the track except through the fireman; that he had on several occasions given such signals to the fireman, but not in the Casein Spur; that the practice of giving signals from the fireman's side of the engine would be followed only when it was known that it was dangerous to pass signals on the engineer's side (R. 102). He further said that he did not make any observa-

tions in respect to the Casein building and track, that he was not after objects or buildings, and that he was after a box car, (R. 119), and that at the time he walked over to the east side of the track said that his mind "naturally would be occupied with the work I was going to do, and getting it done, and how I was going to do it" (R. 134).

## Jurisdiction of This Court

The jurisdiction of this Court is based upon Sec. 237 of the Judicial Code as amended and reformulated by the Act of February 13, 1925; Chap. 229, Sec. 1, 43 Stat. 937, Title 28, U. S. C. A. Sec. 344, providing that it shall be competent for this Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by Writ of Error, any cause wherein a final judgment or decree has been rendered by the highest court of a State in which a decision could be had on any title, right, privilege, or immunity, especially set up or claimed by either party under the Constitution, or any treaty or statute, or commission held or authority exercised under the United States. The judgment of the Supreme Court of Nebraska sought to be reviewed was originally entered on July 20, 1945 (R. 342-355). A motion for rehearing was filed on August 8, 1945, within the time provided by the rules of the Supreme Court of Nebraska (R. 355). That in response to said motion for rehearing the Supreme Court of Nebraska, on October 13, 1945, ordered reargument of the motion for rehearing at a session of the Supreme Court of Nebraska commencing November 5, 1945; that reargument was heard on November 7, 1945; that thereafter the State Supreme Court, on March 22, 1946, denied the motion for rehearing, which is the date on which decision, judgment and decree of the Supreme Court of Nebraska in said

cause became final, and that the Supreme Court of Nebraska was the highest court of the State in which a decision could be had in said cause; that in said cause, petitioner especially set up and claimed a right under a statute of the United States, viz., the Federal Employers' Liability Act, 45 U. S. C. A. Sec. 51, Act of April 22, 1908, Chap. 149, Sec. 8, 35 Stat. 65 (R. 376); which right was denied petitioner by such Supreme Court of Nebraska. Cases believed to sustain the jurisdiction are:

*Lavender* v. *Kurn*, — U. S. —, 90 Law Ed. 692. Decided March 25, 1946;

*Seago* v. *New York Central R. Co.*, 315 U. S. 981, 62 Sup. Ct. Rep. 806;

*Jenkins* v. *Kurn*, 315 U. S. 256, 61 Sup. Ct. Rep. 934;

*New York Central R. Co.* v. *Marcone*, 281 U. S. 345;

*Puget Sound Power & Light Co.* v. *County of King*, 264 U. S. 22;

*Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 Law Ed. 610; 63 Sup. Ct. Rep. 232; 321 U. S. 29, 64 Sup. Ct. Rep. 409; 88 Law Ed. 322;

*Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350, 87 Law Ed. 1444, 63 Sup. Ct. Rep. 1062;

*Tennant* v. *Peoria & U. P. R. Co.*, 321 U. S. 29, 64 Sup. Ct. Rep. 409, 88 Law Ed. 322;

*Owens* v. *U. P. R. Co.*, 319 U. S. 715, 63 Sup. Ct. Rep. 1271, 87 Law Ed. 1683;

*Blair* v. *Baltimore & Ohio R. Co.*, 323 U. S. 600, 65 Sup. Ct. Rep. 545, 89 Law Ed. 490.

## Questions Presented

The questions presented by petitioner's petition herein for a Writ of Certiorari are:

1. Whether, in an action against a railroad carrier under the Federal Employers' Liability Act (45 U. S. C. A.,

Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, Stat. 65) to recover damages for personal injuries sustained while in the employ of defendant railroad, performing duties in the course of his employment, the evidence relating to the proximate cause of such injuries sufficed, under the applicable decisions of this Court, to warrant the submission to a jury of the issues of negligence either in one or more of the following particulars:

(a) Was defendant negligent in failing to provide and maintain for plaintiff a reasonably safe place of work?

(b) Was defendant negligent in failing to warn plaintiff of the dangerous condition which subjected him to personal injury?

(c) Was defendant's locomotive engineer, in proceeding with the movement (engine shoving box car), negligent in proceeding with the movement, the result of which was to squeeze and crush plaintiff between the building wall and the side of the box car when approximately half of the box car had gone by plaintiff?

2. Whether, in an action under the Federal Employers' Liability Act, to recover damages for personal injury of plaintiff, a switch foreman employed in interstate commerce and admitted by defendant to be within the remedial protection and benefit of the Act, the action of the highest court in a State in which a decision could be had in said cause, in ruling that plaintiff made no case for the jury against his employer for failure to provide and maintain a safe place to work, and without taking into consideration undisputed testimony favorable to plaintiff, was erroneous and not in accord with the applicable decisions of this Court. There was substantial evidence that the place of work furnished plaintiff was dangerous and unsafe and that his injury was caused by such dangerous and unsafe place of

work, and also that defendant was negligent in respect to other acts and omissions which concurred in proximately causing injury to plaintiff. The evidence proving such place of work was dangerous and unsafe was clear, cogent and convincing. The evidence showed that where the track curved around the building there was one spot approximately five feet above the ground where the side of the box car, midway between its ends, would come within ten inches of the building wall. This condition existed longitudinally for approximately one foot of space along the building wall at a point well above the ground (probably beginning 4 or 5 feet above). The narrow clearance at this point was due to the short and sharp curve of the track and the fact that the apex of the curve and this spot of the building were opposite each other; the building was on the inside of the curve in the track, and a long and large box car in rounding the curve would crowd toward the building to such an extent that one occupying the position plaintiff did, if unaware of the condition, was likely to become caught and squeezed between the car and the building when the middle of the car would be approximately opposite the apex of the curve. Had Ellis been one foot either north or south of this dangerous spot the injury would not have occurred. This condition had existed for many years. Plaintiff had no knowledge of it. He had not been warned against the danger. The danger was obscure and latent to a casual observer.

3. Whether, in an action under the Federal Employers' Liability Act, was the action of the highest State court in which a decision could be had erroneous and not in accord with the applicable decisions of this Court, in reversing the judgment in favor of plaintiff in the lower court, which judgment had been entered upon the jury's verdict in favor of plaintiff, and in dismissing the action,

merely because it appeared that if plaintiff had performed his work on the other (westerly) side of the track this accident would not have occurred, where the evidence showed that the usual and customary practice on the Casein Spur Track was for the crew to work on the engineer's side of the track, which was the easterly side of the track, that side of the track next to the Casein building.

4. Whether, in such an action as this under the Federal Employers' Liability Act, the action of the highest court in a State in which a decision could be had in said cause, in ruling that plaintiff made no case for the jury, and in holding that he alone was guilty of negligence which was the sole cause of his injury, was erroneous and not in accord with the applicable decisions of this Court; whether because the work in hand could have been performed more safely on the westerly side of the track than on the easterly side of the track, may the master escape liability in the absence of warning, and rules against use of the dangerous side? In other words, in a case such as this, may the master escape liability where he provides and maintains a place of work on each side of a railroad track, one side of which is more dangerous than the other side, and where he sanctions and permits the use of the dangerous side of the track by long continued custom and practice, without giving adequate and sufficient notice or warning of the precise or specific danger, and still be exempt from a charge of negligence; and can it be justly held that the employee alone was negligent in not selecting the safest side?

5. Whether, in this action, the decision of the Supreme Court of the State of Nebraska was erroneous and in conflict with the applicable decisions of this Court in holding, in effect, that there was no negligence on the part of defendant because plaintiff was negligent and voluntarily assumed the risk. A comparison of the two opinions of the Supreme

Court of Nebraska, *Ellis* v. *Union Pac. R. Co.*, 146 Neb. 397, 19 N. W. (2d) 641; *Ellis* v. *U. P. R. Co.*, 22 N. W. (2d) 20, indicate that the Supreme Court of Nebraska was wholly at sea in respect to any comprehensive understanding of the applicable decisions of this Court, as related to the issues involved.

**Reasons Relied on for the Allowance of the Writ**

I

This Action is brought by plaintiff under the Federal Employers' Liability Act (45 U. S. C. A. Sec. 1, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65). His employment by the railroad in interstate commerce and interstate transportation was alleged in his petition and it was stipulated between the parties at the trial that he was subject to and within the provisions of the Act. At the time of his injury on March 15, 1943, he was in the employ of defendant as switch foreman, in charge of a switching and engine crew, engaging in respotting a box car on the Casein Spur track. The salient facts and circumstances of the movement and injury are set forth in the "Summary Statement" of the matter involved. The day he was injured was the first time he had ever worked as foreman in or about the Casein Spur track, which was located in Seattle, Washington; it was a dead end track which would hold not to exceed five or six cars; the dead end of the track was at its southerly end and the only way to get into this track was from the northeasterly end, where it connected with the Myrtle Street track; the necessary movements of the engine and car involved, to accomplish the purposes intended, are adequately described in the Summary. The head, or front of the engine, faced northerly. The tender, and the lone box car which was coupled to the tender, faced southerly. The movement was a back-up movement; the engine and tender

shoving the box car in a southerly direction. The engineer in his cab, looking out of the side window, was on the easterly side of the engine. The Casein building was immediately east of the Casein Spur track. Plaintiff, shortly previous to the start of this back-up movement, crossed to the engineer's side of the track some distance to the south of the box car and from that time carried on his duties on the easterly side of the track, and walked in a southerly direction between the Casein Spur and the Casein building until he came to a stop at the place where he was injured. While in this position about half of the box car went by him; it was at this time that the middle of the car caught up to him that he was squeezed and crushed between the side of the car and the building wall. While standing at the place where he was injured he kept in contact with the engineer, who was to the north of him, and also tried to make contact with his switchman helper, Brown, who was supposed to be at the first loading platform of the Casein building, this platform being located some distance to the south of where plaintiff was standing. The engine and car was moving at a speed of approximately two miles per hour. Plaintiff did not know or realize that he was standing in a position of danger; he assumed that the car would clear him; the forward end of the car and nearly half of it went by him while he was looking in the direction of where his helper switchman, Brown, was supposed to be, in order to make contact with him, and not being able to discover Brown, turned his head in the opposite direction to contact the engineer; it was just as he turned his head that the middle side of the box car caught him and crushed and squeezed him against the building wall.

This dangerous place existed because the curvature of the track was such that the apex of the curve was approximately opposite the place where plaintiff was standing and the track was so located and constructed that when the middle

of this box car (50 ft. 6 in. long, 10 ft. 7 in. wide) approximated the apex of the curve, the side of the box car came within 10 inches of the wall of the building where plaintiff was standing at the time he became caught, squeezed and crushed. No danger sign or notice was posted at or in the immediate vicinity of this danger spot. There was nothing to indicate to a casual observer that here was a place of danger; no trap for the unsuspecting could have been better concealed than was this. This condition apparently had existed for many years; defendant exercised dominion over this track. It was under the supervision and control of its roadmaster. It was maintained by defendant and its section men made repairs, if any were made. It was within defendant's switching zone and it alone carried on switching operations thereon. Its roadmaster and yardmaster and assistant superintendent were all familiar with the conditions and had been for years. It knew, or should have known, of the existence of this danger spot; it should have given plaintiff notice and warning thereof. It failed to do so.

On the Casein Spur track it was the usual custom and practice of the switching crew to work on the engineer's side of the Casein Spur track. Such custom and practice had existed for many years, until after plaintiff was injured. Engineer Buzard said that during his many years experience on the Casein Spur track he had never observed such a crew work on the other side of the track but that they always worked on the engineer's side. The evidence, as a whole, with the inferences fairly and reasonably arising therefrom, was such as tended strongly, if not conclusively, to show that defendant's negligence, either in whole or in part, proximately caused injury to plaintiff.

Nevertheless, the Supreme Court of Nebraska, in its opinion in said cause (*Ellis* v. *U. P. R. Co.*, 22 N. W. (2d)

20) ruled that plaintiff failed to make a case for the jury, and ruled that the submission of the case to the jury would invite a verdict based upon conjecture or speculation, and that there was no substantial evidence to sustain a finding that defendant was negligent. Such ruling is erroneous and not in accord with the applicable decisions of this Honorable Court, holding that on the question whether a case is one for the jury the evidence should be viewed in the light most favorable to the plaintiff, giving the plaintiff the benefit of every inference favorable to him that may be fairly and reasonably drawn from the evidence; that the credibility of witnesses and the weight to be given to their testimony are for the jury; and that if, on the issue of liability, reasonable and fair-minded men may honestly draw this inference from the evidence, such issue is not one of law for the court, but one of fact for the jury.

II

In this case petitioner claimed the right to recover under the Federal Employers' Liability Act for injuries sustained in consequence of the negligence of defendant railroad in failing to provide and maintain a reasonably safe place of work for its employee, this petitioner. The evidence clearly showed that at, and immediately prior to the time of his injury he was working on the easterly side of the Casein Spur track (the engineer's side), where it was the usual and customary place for one performing the work he was engaging in to work; that on this side of the track, along the course which a switchman might reasonably be expected to walk or stand in the performance of the duties which petitioner was engaging in, there was an extremely dangerous place which had been in existence for many years; the danger was one that was obscure and hidden and one not readily discoverable to a casual observer, and particularly to one engaged in the performance

of duties which centered or distracted the attention of plaintiff to the engineer in one direction and his helper switchman in another direction, for the purpose of spotting the box car to its proper location at the loading platform of the Casein building. It is undisputed that this place was one of danger and the evidence is overwhelming that petitioner had no knowledge, notice or warning of it. On the record, and the applicable decisions of this Court, the issue was for the jury, and the Supreme Court of Nebraska was in error in ruling otherwise.

III

On substantial evidence in this case the issue of the negligence of defendant's engineer and such negligence as a proximate cause of the injury to plaintiff was for decision by the jury, under the applicable decisions of this Court, and the Supreme Court of Nebraska erred in ruling to the contrary.

IV

The Supreme Court of Nebraska ruled that petitioner was guilty of negligence which was the sole proximate cause of his injury. Such ruling is in conflict with the evidence and the applicable decisions of this Court.

V

The Supreme Court of Nebraska ruled, in effect, that plaintiff assumed the risk of his injury, that he alone was negligent and that defendant was not negligent; such ruling was not justified by the evidence and contravenes the applicable decisions of this Court.

VI

The Supreme Court of Nebraska, by its decision and judgment in this cause, denied petitioner a right specially

set up and claimed by him under the Federal Employers' Liability Act, viz, the right to have his case submitted to the jury on his claim and theory that his injury, while employed by Respondent in interstate commerce and interstate transportation, resulted from the negligence of Respondent, when there was evidence adduced rightfully engendering that conclusion. It is respectfully submitted that the denial to petitioner of such right plainly calls for the issuance by this Court of its Writ of Certiorari herein.

**Prayer of Petitioner**

Wherefore, Petitioner prays that a Writ of Certiorari be issued by this Court directed to the Supreme Court of Nebraska to the end that the decision and judgment of the Supreme Court of Nebraska in said cause, *Newton W. Ellis, Plaintiff and Appellee,* v. *Union Pacific Railroad Company, Defendant and Appellant,* No. 31889, be reviewed by this Court, as provided by law, and that upon such review said decision and judgment be reversed, and that petitioner have such other relief as to this Court may seem appropriate.

Dated: June 14, 1946.

NEWTON W. ELLIS,
*Petitioner.*

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*Counsel for Petitioner.*

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1946**

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# No. 320

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NEWTON W. ELLIS,

*Petitioner,*

*vs.*

UNION PACIFIC RAILROAD,

*Respondent*

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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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### Opinions of the Court Below

The opinions of the Supreme Court of Nebraska in said cause of *Newton W. Ellis, Plaintiff and Appellee, v. Union Pacific Railroad Company, Defendant and Appellant,* which petitioner here seeks to have reviewed, is reported in: 146 Neb. 397, 19 N. W. (2d) 641; and — Neb. —, 22 N. W. (2d) 20; and appear on pages 342-355 and pages 377-390 of the record filed herewith.

### Statement of the Case

The essential facts of the case are believed to be fully stated in petitioner's Petition for a Writ of Certiorari, and in the interest of brevity are not reported here. Ref-

erence will be made to such facts on the points involved in the course of argument, which follows. Reference to certain facts and evidence not contained in the summary may be referred to in the argument for the purpose of aiding this Court in visualizing the manifest and grievous errors of the Supreme Court of Nebraska.

## Specifications of Error to be Urged

The Supreme Court of Nebraska, in its opinion in said cause, erred:

(1) In holding and deciding that the evidence adduced at the trial of said cause below, did not suffice to make the case one for the jury, and that therefore petitioner, as a matter of law, was not entitled to recover under the Employers' Liability Act as against respondent, Union Pacific Railroad Company.

(2) In holding and deciding that no substantial evidence was adduced at the trial of said cause to warrant the submission of the case to the jury on the claim and theory of petitioner that Respondent, Union Pacific Railroad Company, negligently failed to provide and maintain for petitioner a reasonably safe place of work.

(3) In holding and deciding that no substantial evidence was adduced at the trial of said cause to warrant the submission of the case to the jury on the claim and theory of petitioner, that respondent, Union Pacific Railroad Company, negligently failed to furnish its employee, petitioner Ellis, with a reasonably safe place to work, which negligence, in whole or in part, proximately resulted in petitioner's injuries.

(4) In holding and deciding that to submit the case to the jury upon the theory that petitioner's injury was caused, in whole or in part, in consequence of negligence on the part

of respondent, Union Pacific Railroad Co., in not providing and maintaining for petitioner, its employee, a reasonably safe place of work, would invite a verdict based on speculation and conjecture.

(5) In holding and deciding that to submit the case to the jury on the theory that Respondent, Union Pacific Railroad Company, negligently failed to warn petitioner of the danger which resulted in injury to him was without substantial support of evidence, and would invite a verdict based on speculation or conjecture.

(6) In holding and deciding that the evidence was insufficient to support a finding by the jury that petitioner's injury resulted, in whole or in part, in consequence of negligence on the part of Respondent's servant, the locomotive engineer, G. J. Buzard, and in holding that the submission of such issue would invite a verdict based on speculation or conjecture.

(7) In holding and deciding that petitioner alone was guilty of negligence and that his negligence was the sole cause of his injury, and in denying him a recovery of damages under the Federal Employers' Liability Act on such ground.

(8) In holding and deciding that the burden of proof rested upon petitioner to establish that he did not know that he was in a place of danger and that he could not make discovery of such danger in the exercise of ordinary care on his part, and in denying him a recovery on such ground.

(9) In holding, in effect, that under the facts and circumstances petitioner was an insurer of his own safety, and in denying him a recovery on such ground.

(10) In holding, in effect, that if the master provides two places of work (each side of the track), one of which is

safe and the other unsafe, that in such event the risk is that of the employee and if perchance he takes the unsafe side he cannot recover.

(11) In holding and deciding, in effect, that Respondent was not chargeable with negligence because plaintiff was guilty of negligence and assumed the risk of his injuries, and in denying him a recovery on such grounds.

(12) In reversing the judgment obtained by petitioner in the trial court and dismissing his action.

## Summary of the Argument

(1)

The evidence adduced at the trial of said cause of *Newton W. Ellis* v. *Union Pacific Railroad Co.* on the issue of respondent's liability for the injury of petitioner under the Employers' Liability Act as for negligence on the part of respondent in failing to provide and maintain for petitioner a reasonably safe place of work amply sufficed to make that issue one for the jury; and the Supreme Court of Nebraska erred in holding that petitioner was not entitled to have such issue submitted to the jury.

*Lavender* v. *Kurn*, — U. S. —, 90 L. Ed. 692. Decided March 25, 1946;

*Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350, 87 L. Ed. 1444, 63 Sup. Ct. Rep. 1062;

*Tennant* v. *Peoria & U. P. R. Co.*, 321 U. S. 29, 64 Sup. Ct. Rep. 409, 88 L. Ed. 322;

*Owens* v. *U. P. R. Co.*, 319 U. S. 715, 63 Sup. Ct. Rep. 1271, 87 L. Ed. 1683;

*Blair* v. *Baltimore & Ohio R. Co.*, 323 U. S. 600, 65 Sup. Ct. Rep. 545, 89 L. Ed. 490;

*Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. Ed. 610; 63 Sup. Ct. Rep. 232; 321 U. S. 29, 64 Sup. Ct. Rep. 409; 88 L. Ed. 322;

*Seago* v. *N. Y. Central R. Co.*, 315 U. S. 981, 62 Sup. Ct. Rep. 806;

*Jenkins* v. *Kurn*, 315 U. S. 256, 61 Sup. Ct. Rep. 934;

*Choctaw O. G. R. Co.* v. *McDade*, 191 U. S. 64, 48 L. Ed. 96.

(2)

The evidence adduced at the trial of this cause on the issue of respondent's liability for the injury to petitioner under the Employers' Liability Act as for negligence on the part of respondent in failing to warn petitioner of and against the danger which resulted in his injury, amply sufficed to make that issue one for the jury, and the Supreme Court of Nebraska erred in holding that petitioner was not entitled to have such issue submitted to the jury.

*Kanawha & Michigan R. Co.* v. *Kerse*, 239 U. S. 576, 60 L. Ed. 448.

(3)

The evidence adduced at the trial of this cause on the issue of respondent's liability for the injury to petitioner under the Employers' Liability Act as for negligence on the part of respondent in consequence of the negligent acts and omissions of its servant, the locomotive engineer, G. J. Buzard, amply sufficed to make that issue one for the jury, and the Supreme Court of Nebraska erred in holding that petitioner was not entitled to have such issue submitted to the jury.

*Tennant* v. *Peoria & U. P. R. Co.*, 321 U. S. 29, 64 Sup. Ct. Rep. 409, 88 L. Ed. 322;

*Owens* v. *U. P. R. Co.*, 319 U. S. 715, 63 Sup. Ct. Rep. 1271, 87 L. Ed. 1683.

(4)

The evidence adduced at the trial did not suffice to prove conclusively and as a matter of law that petitioner was guilty of negligence, or that such negligence was the sole cause of his injury, and the Supreme Court of Nebraska erred in holding that there was such negligence and that the same barred petitioner from recovering a judgment in his favor.

*Owens* v. *U. P. R. Co.*, 319 U. S. 715, 63 Sup. Ct. Rep. 1271, 87 L. Ed. 1683;
*Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. Ed. 610; 63 Sup. Ct. Rep. 232; 321 U. S. 29, 64 Sup. Ct. Rep. 409, 88 L. Ed. 322;
*U. P. R. Co.* v. *Hadley*, 246 U. S. 330, 62 L. Ed. 751.

(5)

This Court, on certiorari, is not confined to a consideration of the evidence stated by the state court in its opinion, but will review the entire record and determine for itself the sufficiency of the evidence and whether petitioner was denied a federal right by the opinion, decision and judgment below.

*G. N. R. Co.* v. *State of Washington*, 300 U. S. 154, 81 L. Ed. 573;
*United Gas Public Service Co.* v. *State of Texas*, 303 U. S. 123, 143, 82 L. Ed. 702;
*Chicago G. W. R. Co.* v. *Rambo*, 298 U. S. 99, 80 L. Ed. 1066.

**Argument**

This is an action under the Federal Employers' Liability Act (45 U. S. C. A. sec. 51, Act of April 22, 1908, c. 149, sec. 1, 35 Stat. 65) including (U. S. C. A. Sec. 53 of that Act,

sec. 3, 35 Stat 66), and (U. S. C. A. title 45, sec. 54, and the Act of August 11, 1939, c. 685, sec. 1, 53 Stat. 1404), brought by your petitioner, Newton W. Ellis, to recover damages for personal injuries charged to have been proximately caused by the negligence of the respondent, as set forth in the Petition, namely,

(a) Failure to provide and maintain for its employee, the petitioner, a reasonably safe place of work;

(b) Negligence of respondent in failing to warn petitioner of and against the danger to which he was subjected;

(c) Negligence of respondent's servant, locomotive engineer, G. J. Buzard.

The pertinent provisions of the Employers' Liability Act are:

(1) "Every common carrier by railroad, while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . and such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier."

(2) ". . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee . . ."

(3) ". . . such employee shall not be held to have assumed the risks of his employment in any case where such injury . . . resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . ."

(1)

**Negligence and Its Proximate Cause of Injury in Failure to Provide and Maintain a Reasonably Safe Place of Work, Proven by Substantial Evidence**

Petitioner submits that the evidence adduced at the trial of the cause in the District Court of Douglas County, Nebraska on the issue of respondent's liability under the Employers' Liability Act for injury to petitioner, its employee, as for negligence on the part of respondent, as shown by the record of the cause in the Supreme Court of Nebraska, filed herewith, amply sufficed to make the issue one for the jury, and the Supreme Court of Nebraska erred in holding that petitioner was not entitled to have the issue submitted.

At and immediately prior to the time that petitioner was injured he was on duty as a switch foreman in the switching zone of respondent in the city of Seattle, state of Washington. On March 15, 1943, at about 6:00 o'clock P. M. (Pacific Standard time), or 7:00 o'clock (Pacific war time) on an industrial track known as Casein Spur Track, petitioner, as foreman of a switching crew, participated in the work of re-spotting a box car on the Casein Spur Track. The place and detail of work and circumstances under which the petitioner met with injury are described in the Summary Statement of the Petition for Writ of Certiorari with appropriate references to the record. A plat, Exhibit 1, drawn to a scale of 1 in. to 20 ft., correctly shows the *locus in quo* of the Casein Spur Track and the Casein building (R. 26A.) This plat also shows compass directions, and it is established by the plat, and other evidence not in dispute, that the Casein Spur Track extended in a northerly and southerly direction along the Casein building on the westerly side. The easterly rails of this track at the point

where petitioner was injured, and for some considerable distance both north and south of this point, were located within approximately 57 inches of the westerly wall of the Casein building (R. 26A). A portion of the building wall was of diagonal construction and the track curved sharply around this diagonal wall (R. 26A). The construction and location of the building and track, with respect to each other, was such that if a large box car (50 ft. 6 in. long and 10 ft. 7 in. wide) was being moved over and around the curve of the track, the middle of the car would come within 10 inches of the building wall, over a longitudinal space of approximately 12 inches at a point approximately 4 ft. above the ground, due to the fact that the apex of the curve was opposite this place on the building wall. Thus, when the middle of the car (meaning the middle thereof between the ends of the car) arrived at the apex of the curve there was created the situation and condition in which a switchman might be trapped, squeezed, and crushed between the side of the car and the building, as was Ellis.

Petitioner Ellis was not a railroad hand of long experience; he had a grade school education with one year in high school, following which he engaged in farming and followed the trade of a plasterer for about fifteen years. About the year 1922 or 1923 he was employed by Southern Pacific as a brakeman for about one year; in April, 1942 he entered the service of respondent as a brakeman and switchman, working mostly in the Argo Yards where the work consisted mostly in doing such switching work as was necessary in making and breaking up trains. At the time he was injured he was engaged in industrial work outside of the Argo Yards which consisted of picking up loaded cars or taking empty or loaded cars to or from industries, and first engaged in such industrial work in the

summer and early fall of 1942 as a helper switchman (R. 30). He worked on different shifts at various times while he was a helper and engine foreman, starting with a night shift while on the extra board, and was first promoted to an engine foreman in the month of February, 1943 (R. 31). His promotion was due probably more to the shortage of skilled and seasoned engine foremen or men qualified for such a position, because of the war emergency, rather than to any experience or training on his part. Prior to the time of the accident he had never worked either as a switching foreman or switch helper *in* on the Casein Spur Track, and had never participated in such a movement on the Casein Spur Track as was in operation at the time he was injured (R. 32). The day of the accident was the first time in a period of five or six months that petitioner had occasion to work in or about the immediate vicinity of this industrial zone. There had neither been occasion nor opportunity for him to make other than casual observations in relation to the general conditions existing in and about the Casein Spur Track. Shortly before the accident occurred petitioner crossed from the westerly side of the Casein Spur track to the easterly side thereof, which brought him into the space between the track and the Casein building. The purpose of so doing was to be on the engineer's side of the engine so that petitioner would be in a position to give, receive or transmit signals to or from his helper switchman, who was also working on the east side of the track; switching movements are made according to signals and it was important and necessary that petitioner, the engineer, and switch helper Brown coordinate their work and efforts so that the work in hand might be efficiently and safely carried out. It was of the utmost importance and mandatory for the engineer to keep in contact with petitioner at least until the engineer could make contact with switchman Brown. How important and im-

perative that duty was is aptly illustrated by the testimony of the engineer, when he said that if Ellis disappeared from his view that would be a "stop signal." At the time Ellis crossed to the easterly side of the spur track no cars were on the Casein Spur and of course he could see generally how the track was located with respect to the Casein building; he could also see that the track curved; he did not know the degree of the curvature; and while, of course, he had an eye view of the general amount of clearance between the easterly rail and the Casein building, there was nothing about that which would necessarily impose on a person of ordinary prudence, knowledge that over a space of about one foot in length at some point in the course of the curve there was a spot between the easterly rail of the track and the westerly wall of the building where a person could be trapped and crushed if he happened to be standing in that spot at the precise time that the middle of a long box car reached the apex of the curve. It was this condition which was unknown to petitioner and he had not been warned of it. Had petitioner been skilled in trigonometry and had he been furnished with proper instruments for measuring distances, and had he been possessed of sufficient data he might have been able to figure out what would happen if he remained in the position he was in at the time he became trapped. The danger was not obvious or apparent to the naked eye. Petitioner did not realize or appreciate that he was in a place of danger and naturally assumed that his place of work was safe. That which made this place unsafe were certain factors and conditions which had to merge to produce what occurred. The danger was an obscure, latent and hidden one; petitioner was wholly unaware thereof. Respondent railroad knew, or in the exercise of ordinary care should have known thereof and should have remedied the condition, or, if that was impractical or impossible, it should

have given effective notice and warning of the danger. It is undisputed on the record that petitioner at no time was notified of or warned against this danger and hazard which resulted in his injury. Respondent sought on circumstantial evidence to prove that petitioner had knowledge of the danger. It laid considerable stress on the alleged fact that it had erected and maintained an "impaired clearance" sign. Evidence on the part of the petitioner raised a doubt as to whether this sign was either in the position claimed, and, if there, whether it was in legible condition. The sign itself,—set between eight and nine feet above the ground, where it would be about level with the head of a man who was riding the lower step on the side of a car, and would also be in easy view of the eye of a locomotive engineer riding in the engine cab. The purpose of the sign was undoubtedly to serve as a warning to employees riding the side of a car; it probably was also a warning to the engineer to be on the alert and to exercise care to avoid injury to the members of a switching crew who might be working either on the ground or riding a car on the easterly side of the Casein Spur. This sign was utterly inadequate as notice or warning of the specific danger which caused injury to petitioner. Assuming, for the sake of argument, that the sign was in the position claimed, it was far removed from the point of danger. The plat in evidence shows that it was between 30 and 40 feet from the danger spot. If the sign had said "No Clearance," a more persuasive claim of warning might exist. This particular sign, if maintained in legible condition and if brought to the notice and knowledge of members of a switching crew who had work to do on the Casein Spur, could hardly be construed as a prohibition against working in the space between the Casein Spur Track and the Casein building. The danger was so obscure as to require specific warning, which was not

given. That this place of work was unsafe is undisputed. That it was a proximate cause of petitioner's injury cannot be denied.

Giving to petitioner the full benefit of all reasonable inferences deducible from the evidence that are favorable to him, it seems clear that the issue of respondent's negligence was amply supported by substantial evidence which not only justified but compelled submission of that issue for determination by the jury, and that the Supreme Court of Nebraska was clearly in error in holding otherwise. To sustain this contention petitioner cites and quotes from a few of the more recent decisions.

In *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. Ed. 446, 453, 63 S. Ct. 444, 451, this Court said:

> "Where the facts are in dispute, and the evidence in relation to them is that from which fair minded men may draw different inferences, the case should go to the jury."

In *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350, 87 L. ed. 1444, 63 S. Ct. 1062, this Court, after commenting that the jury is the tribunal to decide issues of fact, where fair minded men might reach different conclusions, (i. e. draw different conclusions), even from uncontroverted evidence, as well as issues involving controverted evidence, went on to say, (319 U. S. 354, 87 L. ed. 1447, 63 S. Ct. 1064):

> "The right to trial by jury is a 'basic and fundamental feature of our system of federal jurisprudence.' Jacob v. New York, 315 U. S. 752, 86 L. ed. 1166, 62 S. Ct. 854. It is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. That method of determining the liability of the carriers and of plac-

ing on them the cost of these industrial accidents may be crude, archaic, and expensive as compared with the more modern systems of workmen's compensation. But however inefficient and backward it may be, it is the system which Congress has provided. To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

This Court in (*Bailey* v. *Central Vermont R. Co., supra,* page 353) commenting on the duty of the master to provide and maintain for the servant a reasonably safe place of work, said:

"As stated by this Court in the Patton Case, it is a duty which becomes 'more imperative' as the risk increases. 'Reasonable care becomes then a demand of higher supremacy and that in all cases it is a question of the reasonableness of the care—reasonableness depending upon the danger attending the place or the machinery' . . . It is that rule which obtains under the Employers' Liability Act. . . . That duty of the carrier is a 'continuing one' . . . from which the carrier is not relieved by the fact that the *employe's work in the place in question is fleeting or infrequent.*" (Italics supplied.)

The reasoning which impelled this Court in the *Bailey* case, *supra,* to hold that the lower court was in error in withdrawing the issue of negligence from the jury applies with equal force to the case at bar.

In the case *of Tennant* v. *Peoria & P. U. R. Co.,* 321 U. S. 29, 35, 64 S. Ct. 409, 412, 88 L. ed. 520, 524, this Court said:

"It is not the function of a Court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof may equally support inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn

by the jury. It is the jury, not the Court, which is the fact finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which is considered most reasonable . . . That conclusion, whether it relates to negligence, causation, or any other factor, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury's verdict merely because the jury could have drawn different inferences or conclusions, or because judges feel that other results are more reasonable. Upon an examination of the record we cannot say that the inferences drawn by this jury that respondent's negligence caused the fatal accident is without support in the evidence. Thus, to enter a judgment for respondent notwithstanding the verdict is to deprive petitioner of the right to a jury trial. No reason is apparent why we should abdicate our duty to protect and guard that right in this case."

In the recent case of *Lavender* v. *Kurn*, et al., *supra*, decided by this Court March 25, 1946, the salutary rules of this Court as pronounced as determinative and controlling as to when the issues in an action under the Employers' Liability Act should be submitted to a jury for determination, and that the jury's verdict in favor of an injured employee should not be lightly taken away have been reiterated and reaffirmed. We quote from *Lavender* v. *Kurn*, et al., *supra*, as follows:

"It is true that there is evidence tending to show that it was physically and mathematically impossible for the hook to strike Haney. And there are facts from which it might reasonably be inferred that Haney was murdered. But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney. The

jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historical function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. See Tiller *v.* Atlantic Coast Line R. Co., 318 U. S. 54, 67, 68, 63 S. Ct. 444, 451, 87 L. Ed. 610, 143 A. L. R. 967; Bailey *v.* Central Vermont R. R. Co., 319 U. S. 350, 353, 354, 63 S. Ct. 1062, 1064, 87 L. Ed. 1444; Tennant *v.* Peoria & U. P. Ry. Co., 321 U. S. 29, 35, 64 S. Ct. 409, 412, 88 L. Ed. 520. See also Moore, "Recent Trends in Judicial Interpretation in Railroad Cases Under the Federal Employers' Liability Act," 29 Marquette L. Rev. 73.

"It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

Notwithstanding the rather numerous decisions of this Court in cases arising under the Employers' Liability Act since the 1939 Amendment of that Act, some state courts of last resort appear to have had difficulty in applying to the evidence and facts in these cases under the Employers' Liability Act, either practically or judicially, the applicable de-

cisions of this Court in determining whether or not the evidence and the law suffice to make a submissible case for the jury. That clearly appears to have been the barrier which the Supreme Court of Nebraska was unable to hurdle. A comparison of the two decisions of that Court in the case at bar manifests the utter confusion and inability of that Court in appraising the petitioner's case in accordance with the applicable decisions of this Court. While in its second decision the Supreme Court of Nebraska has given considerable lip service to the federal rules of law as to the basis for submission of a case to the jury (and by this statement we neither mean nor intend any disrespect for that Court), it has in fact and in effect reversed the rule in favor of respondent and against petitioner and has given the benefit of conflicting inferences to respondent instead of to petitioner. The two decisions of the Supreme Court of Nebraska have led to some startling pronouncements of law which are incompatible with the applicable decisions of this Court under the Employers' Liability Act and which are in conflict with recent trends in judicial interpretations in railroad cases under the Federal Employers' Liability Act. More specific analysis of the opinions of the state court will be made under another heading.

*Defendant Cannot Escape its Primary Duty to Provide and Maintain for its Employees a Reasonably Safe Place of Work on the Pretext or Theory that an "Engineering Problem" was Involved. On the Facts and Circumstances of this Case there was no Engineering Problem*

*Choctaw R. Co.* v. *McDade*, 191 U. S. 64, 67, 48 L. Ed. 96;
*Texas & Pac. R. Co.* v. *Swearingen*, 196 U. S. 51, 49 L. Ed. 382;
*Clay* v. *Chi., Mil. & St. Paul R. Co.*, 104 Minn. 1, 115 N. W. 949.

Defendant exercised dominion over the Casein Spur Track and is chargeable with negligence in placing and maintaining said track in dangerous proximity to the Casein Company building. No technical engineering problem was involved in the location of the Casein Spur Track with respect to the Casein building; even an engineering problem is not a defense if negligently solved. On the record this case involved no engineering problem of technical character. The matter of locating, or relocating, this short single spur track was but a simple task. As Judge Hammond said, in 112 Fed. 888, 50 C. C. A. 591, approved in *Choctaw O & G R. Co.* v. *McDade*, 191 U. S. 64, 67, 24 S. Ct. 24, 25, 48 L. Ed. 96:

> "It (the matter of erecting a water spout so as to provide a safe clearance) is so simple a task, one so devoid of all exigencies of experience, necessity, or convenience, so free of any consideration of skill except that of the foot rule, and so entirely destitute of any element of choice or selection, that not to make such a construction safe for the brakemen on the trains is a conviction of negligence."

In the case at bar, there was no showing of necessity requiring the maintenance of so dangerous a place as where Ellis was caught and trapped. On the undisputed facts it is plain that there was neither justification nor necessity for permitting such a dangerous condition to exist.

In *Bimberg* v. *N. P. R. Co.*, 217 Minn. 187, 14 N. W. (2d) 410-419, the Minnesota Supreme Court, following the applicable decisions of this Court in a case arising under the Federal Act, said:

> "Local useage and general custom, either singly or in combination, will not justify or excuse negligence. They are merely fox holes in one of the battlefields of the law, providing shelter but not complete protection against charges of negligence. The generality of its plan of construction for tressels or bridges cannot ex-

cuse a railroad company from responsibility for negligence in its construction. Such plan of construction, commonly followed and 'fortified', as defendant insists, 'by many years of successful railroad operations' may be evidence of due care, but it cannot avail to establish as safe in law that which is dangerous in fact."

A clear and comprehensive statement of law, as believed by us to be applicable to this case, is to be found in Vol. 4, Dunnell's Minn. Digest, page 377, Sec. 5872:

"Duty of railway companies as to tracks, etc.—In general—A railway company is bound to exercise ordinary or reasonable care to so construct and maintain its roadbed and tracks that they will be reasonably safe for its servants. While a railway company has a right to construct its own road and to solve its own engineering problems in accordance with its own views and to determine what structures it will erect and at what places, it may not, without liability, thereby violate rules of law for the protection of passengers and employees. It is the duty of a railway company to place its structures at a reasonably safe distance from its tracks, so as not to be dangerous to brakemen and other operatives upon the train, or to warn them of such dangers if they exist."

The above rule has support in the following decisions:

*Clay* v. *Chi., Mil. & St. P. R. Co.,* 104 Minn. 1, 115 N. W. 949;

*Choctaw, O. & G. R. Co.,* v. *McDade,* 191 U. S. 64, 48 L. Ed. 96;

*Texas & Pac. R. Co.* v. *Swearingen,* 196 U. S. 51, 49 L. Ed. 382.

The *Clay* case, *supra,* involved the proximity of a platform to a track; the result of the action was in favor of plaintiff. The Minnesota Court said:

"This case involved no engineering problem of technical character. As Judge Hammon said in 112 Fed.

888, 50 C. C. A. 591, approved in Choctaw, O. & G. R. Co. *v.* McDade, 191 U. S. 64, 67, 24 Su. Ct. 24, 25, 48 L. Ed. 96: 'It (the matter of erecting a waterspout so as to provide a safe clearance) is so simple a task, one so devoid of all exigencies of expense, necessity, or convenience, so free of any consideration of skill except that of the foot rule, and so entirely destitute of any element of choice or selection, that not to make such a construction safe for the brakeman on the trains is a conviction of negligence.' And see 4 Thompson, Neg. #4315. The authorities subsequently considered in connection with assumption of risk and contributory negligence fully sustain this view. It is to be immediately noted that Tuttle *v.* Detroit, G. H. & M. Ry. Co., supra, was called to the attention of the Supreme Court in argument in Texas & Pac. Ry. Co. *v.* Swearingen, 196 U. S. 51, 25 Sup. Ct. 164, 49 L. Ed. 382. A conclusion consistent with plaintiff's right to recover here was none the less reached."

In the *Texas & P. R. Co.* v. *Swearingen* case, *supra*, the Court said:

"A railway company cannot be said as a matter of law to have performed its duty to use due care to provide a reasonably safe place for the use of switchmen in its employ when it has located scales where the tracks were only the standard distance apart, leaving a space of less than two feet for the movements of a switchman between the side of a freight car and the scale box when encumbered with a lantern for signal purposes.

"Knowledge of the increased hazard resulting from the dangerous proximity to the rails of a railway scale box cannot be imputed to a switchman simply because he was aware of the existence and general location of the box."

In *New York, C. & St. L. R. Co.* v. *Peele* (1929), 164 N. E. 705, 88 Indiana App. 532, certiorari denied, 279 U. S. 842, 73 L. ed. 988, it was held:

> "That placing of tracks in dangerous proximity was due to the presence of buildings was not sufficient excuse therefore."

It is earnestly contended by your petitioner that there was involved in this case no engineering problem which would justify the Court in using it as a shield either to protect or insulate the railroad against its duty to provide and maintain for its employees a reasonably safe place of work. One of the early cases of this Court which appears to be about the first decision of this Court in which the "engineering problem" was discussed by this Court is the case of *Tuttle* v. *Detroit, Grand Haven & Milwaukee Ry. Co.*, 122 U. S. 189, 30 L. ed. 1115. In that case this Court said:

> "Although it appears that the curve was a very sharp one at the place where the accident happened, yet we do not think that public policy requires the courts to lay down any rule of law to restrict a railroad company as to the curves it shall use in its freight depots and yards, where the safety of passengers and the public is not involved; much less that it should be left to the varying and uncertain opinions of juries to determine such an engineering question."

This statement, however, can hardly be accepted as a hard and fast rule applicable in every case regardless of facts and circumstances, because the Court further said:

> "That the interest of railroad companies themselves is so strictly in favor of easy curves as a means of facilitating the movement of their cars, that it may well be left to the discretion of their officers and engineers in what manner to construct them for the proper transaction of their business in yards, etc."

And following that statement the Court said:

> "It must be an extraordinary case, indeed, in which their discretion in this matter should be interfered with in determining their obligations to their employees."

The Court then went on to say:

> "A railroad yard, where trains are made up, necessarily has a great number of tracks and switches close to one another; and anyone who enters the service of a railroad company connected with the moving of trains, assumes the risk of that condition of things."

Two of the Justices dissented from "the proposition that the railroad company owes no duty to its employees in regard to the sharpness of the curves, of the track in the yards in which they are employed."

The most that can be said for that decision is that it represented the public policy at that time of insulating the employer from the "human overhead," at a time when assumption of risk was a valid defense.

The case of *Toledo, St. Louis & Western Ry. Co.* v. *Allen*, 276 U. S. 165, 72 L. ed. 513, was decided on the theory of assumption of risk, and while it contains some dictum on the engineering problem, the Court said:

> "Having regard to plaintiff's knowledge of the situation, it is clear that the evidence, when taken most favorably to him, is not sufficient to warrant a finding that defendant failed in any duty owed him in respect of the space between the tracks."

Allen, however, was employed as a car checker in a rather busy yard and was injured between tracks, one of which was occupied with cars and on the other of which cars were being moved; there actually was a clearance of two feet and nine inches, without considering the grabirons on the

cinder cars which projected four and one-half inches from each corner. The Court said:

> "While this space was sufficient to enable plaintiff to keep out of the way of moving cars, the danger attending his work would have been lessened if the distance between the tracks had been greater."

Other cases cited by defendant involved semaphores, mail trains, and platforms; these cases are all distinguishable on the facts and circumstances peculiar to each; some of the platform cases are distinguishable because of the fact that the employee took a position between the platform and the side of the car, which was obviously dangerous and was not intended as a place of work, and, further, because the employee knew of the risk and assumed it, or was guilty of contributory negligence when such negligence barred a recovery.

Of all the cases cited by appellant, that of *Davis* v. *Hand*, 290 Fed. 73 (C. C. A. 8), is most nearly analogous, but still is so far removed from the facts and circumstances of the case at bar as to be of no controlling force and effect. In that case it appears that plaintiff had knowledge of the insufficient clearance; that it was not necessary for him to ride on that side of the car which caused him to be crushed between the car and a coal bin adjacent to the track; the track was straight, he was familiar with his surroundings, and familiar with the operation and movement; one of the grounds alleged for recovery was close clearance between the track and the coal bin, a clearance so close that it would not clear a man on the side of a passing car. The Court said:

> "Whether or not this is negligence depends upon facts of each case. The evidence discloses here that the spur was not a busy one. It was not a through track and was not used for general switching, or for

> any purpose other than for storing the occasional car of coal that stood there until unloaded. The deceased had several times performed the only operation for which the track was used, and must have been thoroughly familiar with the clearance and other physical surroundings. It is not contended that it was necessary for the plaintiff to ride on the side of the car. For these reasons we hold that in this case there was no negligence on the part of the defendant and no question for the jury."

This case was decided long before the Federal Employers' Liability Act was amended in respect to assumption of risk, and it is inferable that the result was probably based upon assumption of risk.

In *Houston & T. C. R. Co.* v. *Robins* (Tex. Civ. App. 1929), 23 S. W. (2d) 461, it was held:

> "Where injury sustained by proximity of switch stand to track, judicial inquiry is not precluded by urging defense that its location is an engineering question."

**The Confusion of the Supreme Court of Nebraska in Dealing with the Issues of Negligence in the Case Is Manifest and It Failed Woefully to Scrutinize and Determine the Issues in Conformity with the Decisions of This Court**

It said, in direct conflict with the facts:

> "(a) It was neither customary nor required that plaintiff or any other employee of defendant be there in the performance of duty. It was not a place to work, as hereinafter defined,"

and after setting up this hypothetical statement of facts which is in direct conflict with the evidence, says:

> "Under such circumstances the failure of defendant to have engineers professionally redesign its system of tracks and move them further west after construction

of the Casein Building, over which it had no control, was not negligence."

It was not necessary for defendant to have control of the Casein Building in order to perform its duty to provide and maintain a reasonably safe place of work for its employees. The evidence is conclusive that it alone exercised and had dominion over the Casein Spur track; it could have moved the track a little farther from the building; there was nothing to prevent it from adjusting the track so as to provide a safe place on the easterly side thereof which was the appropriate side because that was the engineer's side. There was plenty of room to the west; a few extra inches in that direction would have made the place safe; it would have been an easy and inexpensive operation to move the track further west and to extend the loading platforms as might be necessary. There was here no complicated or technical engineering problem.

*The Supreme Court of Nebraska In Its Opinions of July 20, 1945, and of March 22, 1946, Demonstrates Its Inability to Cope with the Issues, In Line with the Applicable Decisions of this Court.*

*Ellis* v. *Union Pacific R. Co.*, 146 Neb. 397, 19 N. W. (2d) 641;
*Ellis* v. *Union Pacific R. Co.*, — Neb. —, 22 N. W. (2d) 20.

These two decisions of the highest state court appear to be in conflict except as to final result and conclusion, viz., that petitioner did not make out a submissible case. The first decision comes closer to stating the facts than does the second decision, and is noteworthy for its failure to cite any of the decisions of this court in cases arising under the Federal Employers' Liability Act, as amended in

1939. The second decision for the first time makes reference to the *Tiller, Tennant* and *Bailey* cases, *supra,* and obviously was a valiant effort on the part of the State Supreme Court to justify its original decision on grounds not out of harmony with the applicable decisions of this court.

In the first decision, in discussing the issue as to whether or not respondent was negligent in failing to provide and maintain for petitioner a reasonably safe place of work, the Nebraska Court said:

> "A determination of this issue, or these issues, does not depend upon a resolution of disputed facts. It depends upon application of legal principles to a subsantially undisputed set of facts,"

and then states:

> "There was not sufficient space within which to work at the point where plaintiff was hurt. As already pointed out, plaintiff was in charge of the train crew and it was his duty to control the movements of the train. It was the duty of the engineer to control the movements under the direction of plaintiff or the brakemen who were under plaintiff's control. Control was exercised in daylight by hand signals. Plaintiff was properly exercising control at the time of the accident. It was customary and usually more convenient to exercise control from the right (Engineer's side, that side next to Casein building) rather than the left side, and especially on a curve, the inside of which was to the right, for the reason that it was easier to get signals to the engineer, whose position is in the cab on the right side of the engine. It is also the usual, customary and acceptable practice for trains to be controlled by the engine foreman and his brakemen from the opposite side by relay of signals, usually through the fireman, to the engineer, where convenience, safety, or judgment require. If the latter practice had been followed in this instance this acci-

dent could not have occurred, since on that side of the train there was no question of narrow clearance or obstruction." (R. 351.)

The undisputed fact, as disclosed by the testimony of engineer Buzard, is that on the Casein Spur it was customary for switchmen participating in such a move to work on the engineer's side. He further said that previous to the accident, including all of the time he was firing an engine, as well as while working as engineer, and this covered a period of 18 years, he never saw a man work on the other side of the engine, and that "he always worked on the engineer's side." To make it even clearer and more definite and certain, the engineer further testified that it was not until after petitioner Ellis was injured that on a few occasions, "maybe once or twice," they have worked on the fireman's side.

The Court further said, in its first decision:

> "On the question of negligence on the part of plaintiff, warning or knowledge of the dangerous situation is a matter of importance,"

and then said,

> "A warning of impaired clearance was appropriately placed by the carrier"

(here the Court is usurping the function of the jury because that asserted fact was in dispute),

> "But plaintiff said he had not seen it and the effect of his testimony is that he was never in a proper position to see it. Also he said that he had never been in this vicinity and had no previous knowledge of the surroundings. For present purposes, therefore, it must be assumed that he had no previous warning of the conditions complained of and was chargeable with no knowledge or information in regard thereto except such as would flow from reasonable observation, under

the conditions and circumstances, in the light of his knowledge and experience in the work in which he was engaged." (R. 351.)

The Court then said:

"Whether or not defendant was negligent depends upon the question of whether or not, under the recited facts and within the meaning of the law, the defendant furnished plaintiff a reasonably safe place to work, assuming, of course, that plaintiff had no previous knowledge and was not warned of the impaired clearance between the track and the building."

Continuing, the Court said:

"As a condition to a finding of negligence against the defendant in this respect it must appear either that plaintiff was required to work in the position where he was injured, or that the surrounding conditions and circumstances, coupled with his experience and the requirements of his employment, were insufficient to reasonably apprise him of the danger of that position,"

and then said:

"As already pointed out, he was not required, in the performance of his services for the defendant, to work in the position where he was injured. A reasonably safe place elsewhere was provided. The choice of places within which to work was his own." (R. 352.)

The Court then said:

"The evidence of plaintiff must be accepted, the effect of which is to say that he was not in fact aware of the danger. Was the danger, then, under the circumstances, of such a character that he should have, in the exercise of reasonable care, observed it? Upon the answer to this question depends the answer to the question of whether or not the defendant was guilty of negligence, and also that of whether or not

the plaintiff was guilty of negligence, which was the proximate cause of the accident." (R. 352).

The Court then said:

"Under the rule of the cases in this respect, the burden was on the plaintiff to adduce evidence from which a reasonable inference could be drawn that in the exercise of reasonable care he did not know or could not know of his danger. We think his evidence is not subject to such an inference. It was daylight, he gave the signal for the movement, then, not seeing the brakeman who was to give a signal for the spotting of the car, he turned and walked in the direction of the movement of the car between it and the building, of necessity in very close proximity to both, and thereafter paid no attention to the fact that the car was closing in on him until he was caught. Reasonable regard for his own safety, especially in the light of his duties and his experience, required that he take some note of his surroundings. If after turning about he had paid any attention to his situation the accident could have been readily avoided. To a person in the exercise of reasonable and ordinary care, the danger would have been obvious. It follows, therefore, that the plaintiff, having failed to prove any of his charges of negligence, the Court erred in submitting the case to a jury. It further follows that it is unnecessary to determine directly the question of whether or not plaintiff was guilty of negligence, which was the proximate cause of the accident, * * *." (R. 355).

It is self evident from the above quotations from the opinion in its first decision, that what the Nebraska Court did, was to hold in effect that respondent was free from negligence because petitioner assumed the risk. In other words, the Supreme Court of Nebraska did the very thing which was condemned by the decision of this Court in the *Tiller* case, *supra*. The State Court, in its first opinion, stated facts and inferences deducible from the evidence

that were favorable to petitioner, more so than it did in its second opinion. For instance, with respect to the propriety of petitioner working on that side of the track where he was injured, and the reason for his being there, the Court said:

> "During the afternoon he (petitioner) received an order from the Yardmaster to remove a loaded car from the Spur (Spur Track at Casein building). About 7:00 o'clock P. M. it is true he went to the switch leading into the spur and found thereon two cars, one loaded and one empty. The loaded car was removed, after which, under his direction, the empty car was being returned to be spotted to the west and opposite the Casein plant loading platform. The engineer was backing the car on the spur and receiving his signals for movement from the plaintiff. Just before the accident occurred plaintiff was on the east side of the track and between the car and the building. A brakeman was farther south for the purpose of passing signals to plaintiff, to be passed on by him to the engineer. The purpose of all of which was to spot the empty car opposite the loading platform. According to plaintiff's testimony, the brakeman passed from view on account of the curvature of the building, whereupon plaintiff turned and walked a few feet south. The car continued in the same direction, and in consequence of the narrow space between the track and the building he was caught between the center of the car and the building. That he was caught because there was not sufficient clearance at that point is not questioned." (R. 346-7)

> "In the performance of his work and the control of the train it was proper for the plaintiff to be on the right side. A proper place also was on the opposite side. In the present instance it was less convenient to be on the left side, in view of the curvature of the track and the fact that the engineer, to whom signals were required to be transmitted, was on the right side. The area to the west, or left side, was open

. . and on that side there was no impaired clearance." (R. 347).

The State Court later, in its first opinion, said:

> "As already pointed out, he was not required, in the performance of his services for the defendant, to work in the position where he was injured. A reasonably safe place elsewhere was provided." (R. 352).

In its first decision the State Court did not pass upon the question of whether or not plaintiff was guilty of negligence which was the proximate cause of the accident, but seemed to be laboring under the delusion that "the burden was on the plaintiff to adduce evidence from which a reasonable inference could be drawn that in the exercise of reasonable care he did not or could not know of his danger."

It seems to us that the first decision of the State Supreme Court, in holding that petitioner failed to establish negligence of respondent in failing to provide and maintain a reasonably safe place of work, was based on an unsound foundation and on a theory in conflict with the decisions of this Court. It absolves defendant of negligence because it concluded that the burden was upon petitioner to prove that he did not and could not know of the danger, and on the theory that if petitioner had chosen the other side of the track in which to work he would not have been injured. What it did, without saying so, was to hold respondent free from negligence on the ground that plaintiff assumed the risk.

In holding that "the burden was on the plaintiff to adduce evidence from which a reasonable inference could be drawn, that in the exercise of reasonable care he did not or could not know of his danger", the Supreme Court of Nebraska either inadvertently or unwittingly, or in confusion as to applicable law, confounded some theory of the assumption of risk with some theory of contributory negligence, and

to cap the climax put the burden on petitioner to prove his freedom from either. That these defenses are affirmative defenses, which must be pleaded and proven by defendant, is so well established as to require no citation of authority. However, we call attention to the case of *Central Vermont R. Co.* v. *White*, 238 U. S. 506, 59 L. Ed. 1433, wherein this Court said:

> "The United States courts have uniformly held that as a matter of general law, the burden of proving contributory negligence is on the defendant."

In the case of *Chesapeake & Ohio R. Co.* v. *Proffitt*, 241 U. S. 462, 60 L. Ed. 1102,

> "The employee is not obliged to exercise care to discover dangers not ordinarily incident to the employment but which result from the employer's negligence."

Numerous cases are cited in support of that statement of law in the *Proffitt* case. As assumption of risk is no longer a defense in actions under the Employers' Liability Act, there is no need to further pursue that subject. Reference to contributory negligence and assumption of risk in this part of the Brief is merely for the purpose of emphasizing the delusions under which the Supreme Court of Nebraska labored.

In *Owens* v. *Union Pacific R. Co., supra*, this Court commented that the burden of establishing assumption of risk rests upon defendant.

### *Final Opinion and Decision of the State Court*

It is obvious and apparent, from a reading and comparison of the two decisions of the Supreme Court of Nebraska in the case at bar, that in order to justify the decision of reversal and dismissal of the action with some semblance of reason, the State Court found it necessary to arrive at

the conclusion that the petitioner was guilty of negligence, which was the sole cause of his injury (a conclusion which it avoided or evaded in the first opinion). Such conclusion is untenable, is not supported by the evidence, rests in part on misstatement of fact and distorted inferences. For instance, it is stated in the second opinion:

> "The engineer was subject to plaintiff's commands as he backed south over the Casein Spur at the Myrtle Street crossing. At that time plaintiff stood in the street on the engineer's side, near the corner of the Casein building, at or near a sign, approximately eight feet nine inches (8 ft. 9 in.) high, bearing large type: 'Impaired Clearance'."

Such were not the facts, as indicated by the plat and the testimony of petitioner, reference to which is made in the petition. He crossed the Casein Spur Track from the westerly to the easterly side thereof at a point well beyond (south) the alleged location of the sign, without knowledge of its existence or its significance. In the position occupied by petitioner after he crossed the track, the back and not the face of the sign would have been visible to him. It has already been pointed out in the petition that the photographic exhibits showing the impaired clearance sign must be viewed and considered in connection with the plat to get the right perspective; otherwise the photographs are very deceptive because in the photographic exhibits the sign appears to be close to the building and near where petitioner met with injury. In fact, the sign was between 30 and 40 feet from where petitioner was injured.

In its second opinion, as originally filed on March 22, 1946, in commenting on testimony of locomotive engineer Buzard, the Court said:

> "He never previously had observed employees working between the track and the adjacent building."

The engineer, in fact, had testified that until after Ellis was injured he had never observed or known of employees working on the other side of the track, and that only on one or two occasions since Ellis was injured had they worked on the fireman's side. It should be noted here that this was the testimony of a man with eighteen years of experience, working in and out of the Casein Spur Track in the capacity of either fireman or engineer. This grotesque error and mistake of the Court was evidently called to its attention a few days after the opinion was filed, the source of which we suspect but do not know, for a few days thereafter the foregoing quotation of fact was supplemented by adding thereto the words, "at the point of the accident." The engineer did not so testify. The Court also said:

> "At the inside apex of the curve of the track the building jutted slightly to the west, although the wall of the building extending south from that point was generally the same distance from the track, to-wit: 57 inches. At that jutted point, however, it was nearest the center of a car traveling south around the curve. At all other points north and south along the wall of the building, except the one where plaintiff happened to be at the time of the accident, there was sufficient clearance to avoid injuring plaintiff."

This statement of the Court is misleading unless considered in connection with the plat, the testimony of petitioner, and the undisputed fact as to just where he stood at the time of his injury. The so-called jutted diagonal of the building wall was many feet in length and at the time petitioner was injured he was standing approximately 10 feet south of where the jutted wall began and probably up against the wall. It was the degree of curvature of the track and the shortness thereof that brought the center of the car to this one short spot where there was not sufficient clearance; in fact, there was no clearance; this condition was unknown to

petitioner; he had not been warned against it; he may have been negligent in not being more alert, but he was engrossed in his work and he was trying to keep in contact with the engineer, who was to his north, and the switchman helper, who was somewhere to his south; a portion of the car had cleared him and it was while he was looking to the south and then turned in the direction of the engineer that the center of the car caught him; he was trapped before he discovered the danger, of which he had received no warning. The attention of the engineer was not distracted as was that of Ellis. The engineer had to look in only one direction; he had his eyes on Ellis all of the time, according to his testimony; that was his duty. He could see Ellis, one side of him, from his feet to the top of his head. He observed Ellis' foot turn and knew at once that there was something wrong and stopped almost instantly; the engineer had a commanding view of what was ahead of him; it was daylight; if he could see Ellis from his feet to his head, looking through the narrow space between the side of the car and the building wall, it follows that the engineer could and must have seen the side of the box car converging or crowding in the direction of Ellis. Bear in mind that this engineer had many years of railroad service behind him; he had been in on this Casein Spur many times. He knew, or in the exercise of ordinary care should have known, that Ellis was in jeopardy and that Ellis did not know it. The engineer should have done something about it. He should either have warned petitioner or stopped the movement; to be free from negligence the engineer was in duty bound to exercise reasonable care, under the circumstances, to avert injury to Ellis. It is not contended by petitioner that the engineer failed to exercise reasonable care after Ellis became trapped; it is the contention of Ellis that the engineer was negligent in permitting Ellis to become caught

in the trap. It is believed that the engineer's negligence and its proximate cause of the injury to Ellis was fairly a question of fact for determination by the jury. The fallacy of the final decision of the Nebraska court is in holding Ellis guilty of neglect, which was the sole cause of his injury. It charges him with full knowledge of all of the dangers and hazards existing, this in spite of the fact that Ellis was not a thoroughly seasoned and experienced switchman and that he had had little, if any, opportunity to become familiar with the specific danger which resulted in the occurrence of injury to him. On the other hand, it fully releases the engineer from any responsibility, notwithstanding his many years of experience in the service of respondent and in active work upon and about the Casein Spur. It would seem that the Nebraska court did not exercise sound judgment in appraising the justifiable inferences deducible from the evidence and that in its conclusions and action it has usurped the functions of the jury, in violation of the applicable decisions of this Court. The cases cited by the Supreme Court of Nebraska in support of its conclusion that Ellis was guilty of negligence, which was the sole cause of his injury, do not sustain such conclusion. Those cases, such as *St. Louis and S. W. R.* v. *Simpson*, 286 U. S. 346, 52 S. Ct. 521; *Davis* v. *Kennedy*, 266 U. S. 147, 69 L. Ed. 212; *Brennan* v. *Baltimore & Ohio R. Co.*, 115 Fed. (2d) 557, are clearly distinguishable. Each of those cases involved the violation of a specific and imperative duty which was a primary duty of the person injured and which was the sole cause of the disaster. In respect to other cases cited by the Nebraska court and such text as is quoted in the opinion from (I) Bailey, Personal Injuries, 2d ed., and 39 C. Juris, Master and Servant, it is well to bear in mind that the statements therein contained date back many years when it was public policy to insulate the

master against the so-called "human overhead," and when such defenses as contributory negligence, assumption of risk, and negligence of fellow servant were still effective bars to a recovery by plaintiff in a personal injury suit. The *Tiller* case, *supra; Chicago G.W. R. Co.* v. *Peeler,* 140 Fed. (2d) 865; *Thomson* v. *Boles,* 123 Fed. (2d) 487, 491, indicate that these cases under the Employers' Liability Act are to be appraised in the light of a more enlightened public policy. The Nebraska court in its decision has also taken the harsh view and adopted a strained construction of law in holding that it was not necessary for petitioner to work on the easterly side of the Casein Spur and that he was not required to do so. To sustain its conclusion it has been forced to apply a mandatory meaning to those words. In such construction the Court has gone to great extremes. In most instances it is hardly ever necessary or required that the injured party be at work in the precise spot where he meets with violent injury. It would seem rather that the test should be: "Did the master sanction and permit the use of the place where the servant was injured in furtherance of the master's business?" as in the case at bar, where the custom and practice on the Casein Spur was for switchmen to work on the easterly side of that track. The undisputed evidence, as previously pointed out, is that it was not until after Mr. Ellis was injured that on a few occasions such work was done on the westerly side of the track. The case of *Outcelt* v. *Chicago B. & Q. R. Co.,* 150 Minn. 398, 185 N. W. 495, indicates the proper rule which is favorable to petitioner. The case of *Herring* v. *G. N. R. Co.,* 137 Wis. 367, 119 N. W. 325, cited by the Nebraska court, is not in point; there the servant was injured between a car and a loading platform; the space between the car and the loading platform was not intended as a place of work. The platform cases are distinguishable. The case of *Sweet* v.

*Michigan Central R. Co.*, 87 Mich. 559, 49 N. W. 882; and *Hemmingsen* v. *Chicago N. W. R. Co.*, 134 Wis. 412, 114 N. W. 785, support the contentions of petitioner. It is further evident that the Nebraska court became confused as to the law in respect to the "safe place of work doctrine," because respondent was not owner of the Casein Company building or the property upon which it was located. The court said:

> "There is no evidence that defendant owned, constructed, or had any control over the Casein Company building or the property upon which it was located. There is no evidence that it was constructed or maintained with defendant's consent. It was constructed or re-constructed following a fire, after defendant's tracks were laid in their present form and manner."

And then went on to say, after erroneously stating that the easterly side of the Spur Track was not a place to work,

> "Under such circumstances the failure of defendant to have engineers professionally re-design its system of tracks and move them farther west after the construction of the Casein building, over which it had no control, was not negligence."

Even if such were the facts, it would seem that either before, or at least after the building was reconstructed that respondent would be under some duty to inspect for the purpose ascertaining whether or not the reconstruction of the building created an unsafe place of work for defendant's employees, and if so, it clearly would impose a duty on defendant to give adequate, sufficient and proper specific notice and warning of the danger. That defendant paid little, if any, attention to the safety factor is self evident from the fact that this track had been in existence for many years, both before and since the fire which destroyed the building which the so-called Casein building replaced. Also

that at the time of its original construction another spur track ran off from the Casein Spur to an adjoining property and plant immediately west of the Casein Spur. Because of that original construction there may have been some necessity for locating the Casein Spur as originally constructed to make proper room and allow for the other spur track which served the adjoining property to the west. However, the evidence is undisputed that this other spur track had been abandoned for many years, notwithstanding which defendant left the old abandoned track where it was and permitted to remain in the Casein Spur Track a so-called frog, or crossover, by means of which the abandoned track connected with the Casein Spur (R. 178-9). This frog had never been removed, notwithstanding it created a hazard to railroad operation on the Casein Spur and should have been removed (R. 340). Attention is called to this matter as an illustration that defendant was not greatly concerned over the safety of its employees while performing switching duties in or about the Casein Spur.

Notwithstanding the assertion of the Nebraska Court that defendant had no control over the Casein building and hence was under no obligation "to have engineers professionally redesign its system of tracks and move them further west after construction of the Casein building", this cannot be said to be a legal excuse for its failure to locate this short spur track somewhat farther from the narowest point of clearance, particularly so because of the short length of that narrow space, and where there was ample open space to the west. Defendant's general yardmaster, Estes, admitted that there was considerable open space on the westerly side of the track. (R. 227). That plat, Exhibit 1, also shows this. Under the statute law of the state of Washington, defendant was clothed with sufficient power to locate and construct spur track

in such a way as to fulfill its obligation to provide and maintain for its employees a reasonably safe place of work.

REMINGTON'S REVISED STATUTES OF WASHINGTON, SECTION 10465, VOLUME 11, PAGE 118

"Spur Tracks—Limit as to eminent domain—Any railroad corporation organized under the laws of this state, or of any other state, and authorized to do business in this state and owning or operating a railway in this state, may construct, maintain and operate public spur tracks, from its railroad or any branch thereof, to and upon the grounds of any mill, elevator, storehouse, warehouse, yard, dock, wharf, pier, manufacturing establishment, lumber yard, coal dock, or other industry or enterprise, with all side tracks, storage tracks, wyes, turnouts, and connections necessary or convenient to the use of same; and such company may acquire by purchase or condemnation, in the manner provided by the laws of this state for the acquisition of real estate for railway purposes, all necessary rights of way for such spur tracks, side tracks, storage tracks, wyes, and turnouts, and connections; said spur when constructed to be a public spur for the use of all industries located or thereafter located thereon * * *."

NOTE: The omission has to do with extent of mileage or length of such spur tracks.

*Failure to Warn Petitioner Constituted Negligence and was In Violation of the Duty to Provide and Maintain a Reasonably Safe Place of Work.*

Prior to the time that plaintiff was caught by the car he received no warning from the engineer and had never received any warning, notice, or instructions from the engineer, or other members of the crew, with respect to the clearance between the track and the building, or any warning or instructions with respect to the degree of

curvature of the track as it rounded the building. None of his superiors had ever warned or instructed him as to the situation and condition on the Casein Spur Track with respect to insufficient clearance. (R. 63-4). Up to the time the car came in contact with him he did not know that he was in a place of danger or that there was insufficient clearance. (R. 32). It had been agreed at the trial that there had been no change in the location of the tracks or building since Ellis was injured. (R. 27). This admission laid the foundation for considerable of the evidence that was introduced as to conditions that were observed subsequent to the accident. Plaintiff also testified that he was not in the vicinity of the northwest corner of the Casein building at any time on the day of the accident, or at any previous time, and made no observations until sometime after he was hurt. (R. 119-120). In preparation for the trial defendant had taken plaintiff's discovery deposition on March 6, 1944. (R. 74). At the trial this question was asked Mr. Ellis: Let me ask you, Mr. Ellis, at the time your deposition was taken, if these questions were asked and if you made these answer?:

> "Q. The place where you were standing is the place where the greatest curvature of that track occurs, isn't it?
> A. I believe so. I never measured it. I don't know.
> Q. Is that the way it appeared to you?
> A. That is the way it looked.
> Q. As you were standing there?
> A. Yes.
> Q. Did you so testify?
> A. Yes." (R.103-104).

On the basis of this quoted testimony, the Supreme Court of Nebraska adopted an inference unfavorable to plaintiff as to knowldege of the conditions, whereas in view of

plaintiff's positive testimony that he had made no observations and did not know of the conditions until long after the accident, it was a justifiable inference for the jury to draw that this testimony of plaintiff was induced by observations made after the accident. It appears from the testimony of plaintiff that since the accident he had had visited the scene of it three or four times, the first time being between June 22 and the latter part of August, 1943, and the last time being a day or two before his deposition was taken, which was on Monday, March 6, 1944. (R. 125-6). On the first of these visits it was also the first time that he had ever observed the impaired clearance sign. (R. 126). At no time before plaintiff was injured had he made any close or particular observation or inspection with reference to the curvature of the Casein Spur Track and the distance between the track and the Casein building; and at the time he walked over to the east side of the track, testified that his mind "naturally would be occupied with the work I was going to do, and getting it done, and how I was going to do it." (R. 119-120, 134).

It is clear, from the evidence, that defendant not only maintained and provided an unsafe place of work on the easterly side of the Casein Spur Track, and sanctioned and permitted its employees there to work, by long continued usage, custom and practice, all without timely, adequate or sufficient notice and warning of the danger. That its negligence in so doing was, under the evidence, an issue for the jury is not open to doubt. This Court, in the case of *Kanawha and Michigan Railway Co.* vs. *Kerse*, 239 U. S. 576, 60 L. Ed. 448, in the syllabus said:

> "It is actionable negligence under the Employers' Liability Act of April 22, 1908, 35 Stat. L. 65, c. 149, Comp. Stat. 1913 (sec. 8657), for a railway company, through its employees, to conduct its switching opera-

tions upon a private switch in such a manner as to endanger the lives of brakemen upon its cars."

The facts, in some respects are analogous to the facts in the case at bar, notwithstanding that the obstruction was an overhead one over a private switch track, the obstruction having been erected not by the railroad company but by the Kanawha Brewing Company which had a private switch running through its premises and connecting with defendant's main line; and the obstruction had been in position over a period of time estimated as varying from two or three days to a month. It further appeared:

"It was necessary for members of defendant's yard crew to pass in and out of the switch and under the obstruction frequently. The timber was in plain view but because of a sharp curve in the switch track could be seen by those upon the top of a car for only a short distance when approaching it. On the 23rd day of April a switching crew, of which Barry was that day a member, went upon the switch to haul out upon the main line a car destined for interstate commerce. The engine, in charge of one Leonard, was backed in upon the switch and Barry coupled up the car, which was an ordinary box car, and then climbed to the top of it. Leonard started to pull out of the switch and as the train proceeded, Barry, who was standing near the rear end of the car, and not looking forward, but sidewise, (presumably watching Wintz, the conductor, who was standing upon the ground, in charge of the train), came in contact with the timber and was thrown to the ground, sustaining a fracture of the skull, from which he soon died."

The Court then said:

"The action of the Railway Company, through its employees, in conducting its switching operations upon a switch obstructed, as this one was, in such a manner as to endanger the lives of brakemen upon its cars,

speaks so clearly of negligence that no time need be spent upon it. The evidence that the timber had been in the position described for a considerable period of time was presumptive evidence of notice to the company."

The rule which requires the employer to exercise ordinary care to provide and maintain for the employee a reasonably safe place of work includes the duty to give warning in respect to dangerous and hazardous conditions, and particularly as to such as are not obvious and readily observable. It also includes the duty to adopt a safe plan and method of doing the work; it may require the promulgation, adoption, and enforcement of rules and regulations in respect to how the work is to be done and carried on. The duty is a broad one, designed for reasonable protection of life and limb. The duty to furnish a safe place of work is applicable even in situations where employees are sent to the premises belonging to another. *Kanawha Michigan R. Co.* v. *Kerse, supra; Ryan* v. *Twin City Wholesale Grocery Co., et al.*, 210 Minn 220, 397 N. W. 705; *Harding* v. *Railway Transfer Co.*, 80 Minn. 504, 83 N. W. 395; *Hemmingsen* v. *Chicago N. W. R. Co.*, 134 Wis. 412, 114 N. W. 785; *Sweet* v. *Michigan R. Co.*, 87 Mich. 559, 49 N.W. 882; in the case of the *Chesapeake & Ohio R. Co.* v. *Proffitt*, 241 U. S. 462, 60 L. ed. 1102, this Court, speaking through Mr. Justice Pitney, said:

"The employee has a right to assume that the employer has exercised proper care with respect to providing a reasonably safe place of work, (and this includes care in establishing a reasonably safe system or method of work)."

In *Hemmingsen* v. *Chicago N.W. R. Co., supra*, a case in many respects closely analagous to the case at bar, a notice had been served on the injured employee before the injury, "to the effect that there were obstructions dangerously

close to the track and that he was required to look out for them". It was contended that service of this notice was sufficient warning of the danger and that the employee assumed the risk and was guilty of negligence. However, the Wisconsin Court disposes of this contention, stating:

> "There is no claim, however, that any notice was given deceased of the particular dangerous condition in question, and we do not think, as a matter of law, such notice could have the effect of charging him with the assumption of risk, or of negligence in not finding it."

In *Southern Railway Co.* v. *Hobbs* (C.C.A. N.Car. 1929), 35 Fed. (2d) 298, it was held:

> "Evidence of failure to warn switchmen of electric lights hung dangerously low over tracks, was sufficient to make case for the jury."

In *Westover* v. *Wabash R. Co.* (Mo. 1928) 6 S.W. (2d) 843, it was held:

> "Whether nearness of switch stand to track and danger therefrom would have inevitably appeared to person in plaintiff switchman's position, was jury question."

In *McIntyre* v. *St. Louis & San Francisco Ry. Co.* (1921), 286 Mo. 234, 227 S. W. 1047, certiorari denied (1921), 41 S. Ct. 376, 255 U. S. 573, 65 L. ed. 792, it was held:

> "In an action for death of a switchman carried against falsework in dangerous proximity to the track, whether defendant railroad exercised reasonable care in respect to warning decedent of the dangerous character of the falsework, was for the jury under evidence."

In *Texas* v. *Pacific R. Co.* v. *Swearingen*, 196 U. S. 51, 49 L. ed. 382, this Court said:

> "A railway company cannot be said as a matter of law to have performed its duty to use due care to provide a reasonably safe place for the use of switchmen in its employ when it has located scales where the tracks were only the standard distance apart, leaving a space of less than two feet for the movements of a switchman between the side of a freight car and the scale box when encumbered with a lantern for signal purposes.
>
> "Knowledge of the increased hazard resulting from the dangerous proximity to the rails of a railway scale box cannot be imputed to a switchman simply because he was aware of the existence and general location of the box."

In *New York, C. & St. L. R. Co.* v. *Peele* (1929), 164 N. E. 705, 88 Indiana App. 532, certiorari denied, 279 U. S. 842, 73 L. ed. 988, it was held:

> "That placing of tracks in dangerous proximity was due to the presence of buildings was not sufficient excuse therefor."

In *New York* v. *C. & St. L. R. Co.* v. *Boulden* (C. C. A., Ind., 1933), 63 F. (2d) 917, certiorari denied (1933), 53 S. Ct. 785, 289 U. S. 753, 77 L. ed. 1948, it was held:

> "Railroad's negligence in allowing projecting post at edge of station platform causing conductor to fall, was for jury."

In *Washington Ry. & Electric Co.* v. *Scala* (1917), 27 S. Ct. 654, 244 U. S. 630, 61 L. ed. 1360, affirming, 45 App. D. C. 484, it was held:

> "Maintenance of electric railway of a pole so close to track that conductor cannot safely discharge his duties, was evidence of negligence, justifying submission of question of liability of company for his death."

In *Baker* v. *New York, N. H. & H. R. Co.* (1920), 181 N. Y. S. 675, 191 App. Div. 322, it was held:

> "Where an employe was killed by coming in contact with a charged electric wire, so placed on the bridge where he was required to work that he might, through momentary inattention, stumbling, or carelessness, come in contact with it, and there was no evidence that screening the wire, or locating it so that it would not come in contact with employes, was impossible, it could not be said as a matter of law that a safe place of work had been furnished, though there was no evidence of the practice of other companies, and it was error to direct a verdict for defendants."

**The Supreme Court of Nebraska Was in Error in Holding That the Evidence Did Not Justify the Submission to the Jury of the Engineer's Negligence**

In its first decision that Court, erroneously, concluded that this issue was submitted under the doctrine of "last clear chance." In its second decision the Nebraska Court abandoned this fallacious theory and, then, adopted the untenable conclusion that this issue was not submissible on any theory. As already pointed out, Engineer Buzard had many years of experience, both as locomotive fireman and engineer; he had worked in and out of the Casein Spur track in switching operations over a period of eighteen years in switching Spur track was located in close proximity to the Casein Building ever since that building was constructed following the destruction by fire of a building formerly occupied by Fox River Butter Company at substantially the same site; defendant's assistant superintendent did not recall that any change was made in the location of the spur at that time and the evidence is persuasive, if not conclusive, that no change had been made in the location of the Casein spur track during a period of at least eighteen (18) years preceding the accident to Peti-

tioner Ellis (R. 239-40). As pointed out in the summary of the evidence contained in the Petition for Writ of Certiorari, defendant alone exercised dominion over this track; it was a dead-end track capable of holding not to exceed five or six box cars; as shown by the plat, the Casein Building had but three unloading platforms spaced far enough apart so that a car could be spotted at each loading platform; the evidence further is that any engine coming into the Casein Spur track would have to do so by backing in and this of necessity brought the engineer's side of the locomotive next to the building. The implication is overwhelming that the engineer was thoroughly familiar with the conditions existing on the easterly side of the Casein Spur. In backing in on this track, he was on the inside of the curve; the action of a box car in rounding the curve would be repeated, in some degree, by the engine tender as well as by the locomotive or engine proper whenever the tender or locomotive would go in on the Casein spur far enough to round the curve in the track, which must have been the case whenever a box car had to be spotted at or removed from these various loading platforms. In spite of these indisputable facts, the Supreme Court of Nebraska jumped to the conclusion that the engineer was unaware of the danger and impending peril to Petitioner Ellis; this in spite of the testimony that the engineer had his eyes upon Ellis at all times and that his imperative duty was to watch Ellis; the engineer had a commanding view of what was going on ahead and in the narrow space that existed between the car and the building as the car was being shoved in on the track he could not help but notice and observe that as the car proceeded ahead the side of it was gradually edging over toward Ellis. If the engineer did not see what was taking place, and if he did not appreciate that Ellis was in imminent danger, it was merely so because he was

careless and not alert. At least, that was an inference which the jury could properly draw from the facts and circumstances. In order to exonerate the engineer from a charge or inference of negligence the Nebraska Court, in its final decision, said

> "No such accident had ever happened in his previous experience. He never previously had observed employees working between the track and the adjacent building at the point of accident. He was not aware that plaintiff would place himself in danger and the peculiar happening was not reasonably foreseeable by him."

The answer to that line of reasoning is that Ellis had already placed himself in a position of danger; that this should have been apparent to the engineer; that he should have appreciated that Ellis was unaware of his danger and if, as the Nebraska Court said:

> "He never previously had observed employees working between the track and the adjacent building at the point of accident,"

this should have put him even more on the alert. That the engineer could have avoided the accident by prompt action on his part either by stopping the movement before Ellis was caught or by warning Ellis is self-evident. The distance within which he stopped after Ellis was caught, and the fact that this particular engine had the best brakes of any engine defendant had and that it could be stopped quicker than any other engine confirms the negligence of the engineer in not avoiding the accident (R. 194-5). It is believed by petitioner that the testimony of the engineer, considered in its entirety in connection with the undisputed facts and circumstances, makes it clear that there was a submissible case for the jury on the issue of the engineer's negligence.

That the Supreme Court of Nebraska was in confusion as to some of the facts and the evidence is illustrated by what that Court said in its second decision in which it exonerated engineer Buzard of negligence. It said, in the decision as filed March 22, 1945,

> "He never previously had observed employees working between the track and the adjacent building" (R. 383).

Some days later it added to that statement the words, "at the point of accident" (R. 383). Engineer Buzard, however, testified as follows:

> "Q. Can you tell us whether or not Mr. Ellis was working on the customary side in respect to the movement you were making at the time of the accident?
>
> "A. Well, all I can say about that is that previous to this accident and including all of the time I was firing an engine I never saw a man work on the other side of the engine. He always worked on the engineer's side (R. 196).
>
> "Q. *In* on that Casein Spur Track?
>
> "A. Oh, I would say maybe onec or twice they have worked on the fireman's side since then, but most always they worked on my side" (R. 196).

It is suggested that a reading of the entire testimony of engineer Buzard will be helpful to this Court in determining that his testimony, in connection with undisputed facts and circumstances, clearly made the alleged negligence of the engineer a question of fact for determination by the jury and not the Supreme Court of Nebraska. It might as well be stated here that the able and learned trial Court followed the applicable decisions of this Court, but that the Supreme Court of Nebraska did not.

Although the Court in its first opinion had said that either

side of the track was a proper place to work (R. 347), it made a complete turn about in its second opinion wherein it said:

> "It was neither customary nor required that plaintiff or any other employee of defendant be there in the performance of duties. It was not a place to work, as hereinafter defined" (R. 386).

While the last quoted statement was in that part of the opinion which dealt more with the question of defendant's negligence in failing to provide or maintain for its employees a reasonably safe place of work, it illustrates and emphasizes that the Supreme Court of Nebraska was searching the record for evidence and inferences which would lend support to a conclusion that defendant was free from negligence; and, that it did not, in accordance with the federal rule, and the applicable decisions of this Court approach the questions involved on the appeal from the standpoint of due consideration to all reasonable inferences favorable to this petitioner.

The Nebraska Court in its second opinion herein evidently concluded that petitioner failed to prove by any substantial evidence the negligence of defendant in respect to any of the issues submitted, as well as that he failed to prove by substantial evidence that the negligence asserted was the proximate cause of his injuries. In reaching such conclusion it would seem to be clear that the Nebraska Court did not give to plaintiff the benefit of all the evidence and reasonable inferences which favored plaintiff's cause, and that the Nebraska Court interpreted that which in fact and in law was substantial evidence to be but a scintilla of evidence and to be but speculative and conjectural. It is believed by petitioner that this error of the Supreme Court

of Nebraska is clearly established by the decisions of this Court.

*Lavender* v. *Kurn*, — U. S. —, 90 L. Ed. 692. Decided March 25, 1946;

*Seago* v. *New York Central R. Co.*, 315 U. S. 981, 62 Sup. Ct. Rep. 806;

*Jenkins* v. *Kurn*, 315 U. S. 256, 61 Sup. Ct. Rep. 934;

*New York Central R. Co.* v. *Marcone*, 281 U. S. 345;

*Puget Sound Power & Light Co.* v. *County of King*, 264 U. S. 22;

*Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. ed. 610, 63 Sup. Ct. Rep. 232; 321 U. S. 29, 64 Sup. Ct. Rep. 409; 88 L. ed. 322;

*Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350, 87 L. ed. 1444, 63 Sup. Ct. Rep. 1062

*Tennant* v. *Peoria & U. P. R. Co.*, 321 U. S. 29, 64 Sup. Ct. Rep. 409, 88 L. Ed. 322;

*Owens* v. *U. P. R. Co.*, 319 U. S. 715, 63 Sup. Ct. Rep. 1271, 87 L. ed. 1683;

*Blair* v. *Baltimore & Ohio R. Co.*, 323 U. S. 600, 65 Sup. Ct. Rep. 545, 89 L. ed. 490.

In addition thereto:

*Myers* v. *Pittsburgh Coal Co.*, 233 U. S. 184, 58 L. ed. 906;

*Western Atlantic R. Co.* v. *Hughes*, 278 U. S. 496, 73 L. ed. 473.

**The Supreme Court of Nebraska Erred in its Final Conclusion that Petitioner Ellis Was Guilty of Negligence Which Was the Sole Cause of His Injury**

In arriving at this conclusion the Nebraska Court did so in violation of the applicable decisions of this Court. Its reasoning was still contaminated by some of the old com-

mon law rules which had caused courts to scramble negligence, contributory negligence and assumption of risk. The Nebraska court was still flirting with assumption of risk regardless of certain statements made in its second opinion, which, on the face, indicated some endeavor to take note of the applicable decisions and rules of this Court. It said:

> "However, it is as important to remember that the employee still assumes the risk of those of the dangers in his employment which are naturally inherent in the business and not caused by or the result of defendant's negligence."

The extent to which this remembrance of assumption of risk influenced the court in its final conclusions is rather apparent from a comparison of its two opinions in the case at bar. In *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 58, 87 L. Ed. 612, this Court said:

> "We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to 'non-negligence.' As this Court said in facing the hazy margin between negligence and assumption of risk as involved in the Safety Appliance Act of (March 2) 1893, 45 U. S. C. A., Section 1: 'Unless great care be taken, the servant's rights will be sacrificed by simply charging him with an assumption of the risk under another name;' and no such result can be permitted here."

It may well be that plaintiff was guilty of some negligence and the jury could so find. However, on the record in this case his negligence was no more than contributory to and concurrent with that of defendant. This conclusion, we believe, necessarily follows from such cases as

*Tiller* v. *Atlantic Coast Line R. Co., supra;*

*Owens* v. *Union Pacific R. Co.*, 319 U. S. 715, 87 L. Ed. 1683;

*Outcelt* v. *C. B. & Q. R. Co.*, 150 Minn. 398;

*Union Pacific R. R. Co.* v. *Hadley*, 246 U. S. 330, 334, 62 L. Ed. 751.

The reasoning of this Court in *Owens* v. *U. P. R. Co.*, *supra*, in connection with the facts of that case appears to be decisive in support of petitioner's contention that the Supreme Court of Nebraska was in error in holding that petitioner was guilty of negligence which was the sole cause of his injury. At the time Owens' cause of action arose the defense of assumption of risk had not yet been wiped out by the 1939 Amendment.

In *Owens* v. *Union Pacific R. Co.*, *supra*, the Supreme Court again had occasion to reverse the court below (129 Fed. (2d) 1013). This case is of interest and helpful to a proper decision in the case at bar; Owens, a switchman of 15 years' experience, was injured while a member of a switching crew, his injury and subsequent death resulting from an engine movement. Owens was injured prior to the 1939 Amendment of the Federal Employers' Liability Act, which abolished assumption of risk. The railroad company introduced evidence to avoid any implication of negligence and to establish an asserted defense of assumption of risk. Commenting on this evidence, the Supreme Court said:

> "The purpose of this evidence apparently was two-fold. The first object was to show that the company was not negligent. It sought particularly to avoid the effect of a finding that the engineer's failure to ring the bell was a violation of Rule 30 and therefore was negligence per se. But the evidence also was directed to prove that, apart from the ringing of the bell, neither Koefod nor the engineer acted negligently in assuming that Owens knew the matters sought to be proved and

would remain at the switch until the cars had passed by; and therefore that they acted properly in going ahead without taking the precautions which would have been necessary if they had not been entitled to make this assumption.

"The same evidence also was the basis of the company's contention that Owens assumed the risk of his injury. Although the Court of Appeals declined to determine whether it would support a legal conclusion there was no negligence, it apparently accepted the company's view that it established assumption of risk as a matter of law."

Attention was called to the *Tiller* case and the Court said:

"Recently this court reviewed the 'maze of law which Congress swept into the discard' when, in August 11, 1939, it amended the Employers' Liability Act to abolish the defense of the assumption of risk. In view of the Amendment, no good purpose would be served in going over this morass again merely to dispose of this case, but we point out a few lodestars."

The Supreme Court ruled that assumption of risk was not conclusively established, stating:

"For, to prevail on this defense, Respondent had the burden of persuading the jury that the risk of being run down was 'so observable' that Owens was in fact aware of it and decided to chance it. Less than that, under this Statute, would be no more than contributory negligence, which cannot be interchanged or overlapped with assumption of risk as a defense."

The Court further said:

"The record shows neither such evidence of an informed and deliberate choice by Owens as would preclude a contrary verdict, nor so 'obvious' or 'apparent' a danger as would do so."

And the Court further said:

> "If there was negligence by the Respondent, the Statute requires something more than contributory negligence to defeat recovery, although that may minimize the damages. The jury found this issue in favor of the plaintiff, and the Court of Appeals did not purport to deal with it and did not do so unless, in the guise of finding assumption of risk, it identified the two. Since it did not deal with the question, we do not decide it. But we think it is clear that on the facts Owens' conduct amounted to no more than contributory negligence, if it was that."

In its second opinion the Supreme Court of Nebraska cites and quotes from the case of *Morris* v. *Pryor*, 272 Mo. 350, 198 S. W. 817, 821. After stating that it is a case almost identical with the one at bar, it further said:

> "As much as we pity the respondent, whose heedlessness in a work requiring constant watchfulness, has brought upon him this injury, we cannot see that the appellant, by negligence, has contributed to it in any degree."

An examination of that case discloses that it has many distinguishing features from the case at bar; the case was decided December 1, 1917; the plaintiff was a switchman of 19 years' experience; it was neither necessary, proper nor customary to work on that side of the track where he was injured; he had completed his work on that side of the train where he was injured and unnecessarily remained there; the spur track in that case served two different industries; a 30 degree curve in the track was involved; there was nothing in the testimony that explained why plaintiff went in on that side of the car to do coupling; the engineer could not be seen from either side and it was customary to work on the other side, that is, the outside of the curve, which was the safe side. The Court concluded in that case

that defendant was not negligent because plaintiff assumed the risk. That case clearly on its facts does not control the case at bar, and is further rendered impotent by the 1939 Amendment of the Employers' Liability Act which wiped out the defense of "assumption of risk."

Its citation by the Nebraska court is further evidence of the confusion of that Court in dealing with a case arising since the assumption of risk was abolished.

In *Illinois Central R. Co.* v. *Shinners, Admx.*, 97 S. W. 552, where deceased, while working as an inspector in a railroad yard, stumbled and fell over a jack block immediately adjacent to one of the rails, the plaintiff recovered a verdict, and on appeal the Court pointed out that *failure to choose a safe way instead of the unsafe way is no more than contributory negligence and does not bar recovery under the Federal Employers' Liability Act.*

A consideration of the cases in which this Court has held that an employee's negligence was the sole cause of his injury or death emphasizes that the case at bar is not subject to such a holding.

In *Southern Railway Company* v. *Youngblood*, 286 U. S. 313, cited by the defendant, it was held:

> "Failure of a railroad conductor to obey a written train order to pass another train at a stated point, in consequence of which a headon collision occurred, in which he was killed, was the sole cause of his injury and death."

In *Southern Railway Company* v. *Danzler*, 286 U. S. 318, a companion case to the Youngblood case, it was held that—

> "failure of a railroad engineer to obey the same written train order was the sole cause of his death."

*Frese* v. *C., B. & Q. R. R. Co.*, 263 U. S. 1, is a case where the engineer was killed in a collision which resulted from

his failure to stop his train at a grade crossing with another railroad, and it was there held that the engineer's violation of the statute was the sole cause of the accident, and no recovery could be had for his death.

At the time petitioner was injured he weighed about 175 pounds and was about 5 ft. 11 in. tall. (R. 52).

Plaintiff's Exhibit II (R. 56A) is a picture showing a portion of the wall of the Casein building; as you look into the picture the view is toward the south; the rail running diagonally between the two rails of the Casein Spur Track is a part of an abandoned track; the lowest white spot on the building wall is a sun spot and that is the place where petitioner was caught and injured; that is also the approximate location of where indentations were made in the building wall when he was crushed between the side of the car and the building wall. (R. 53-56 incl.).

Plaintiff's Exhibit III (R. 58A) is a picture of the same location but in this picture, as you look into it, the view is somewhat toward the north and east. The man shown in the picture is petitioner showing approximately his position and location at the time of the accident. (R. 57-58 incl.).

Plaintiff's Exhibit IV (R. 62A) is a picture showing the same general location as Exhibits II and III, the view being somewhat to the southwest (R. 59). The picture shows the Casein Spur Track, as well as the abandoned track which formerly extended to the Continental Can Company building, also shown in the picture. (R. 59-61, incl.); location of tracks and buildings was the same as at the time of the accident. (R. 61-62).

Questioned by defendant's counsel as to whether or not he took any precautions for his own saftey, he said: "Assuming it was a safe place to work, there wasn't any reason for taking any precautions." (R. 101). Petitioner's discovery deposition was taken on March 6, nearly a year after the accident, which occurred March 15, 1943. After

the accident he visited the scene of it three or four times. (R. 125). The entire testimony of Mr. Ellis warrants the inference that much of the knowledge sought to be charged against him in respect to the danger attending his work at the time of the accident, was gained by him by reason of observations made by him long after the occurrence of the accident.

Plaintiff's Exhibit XII (R. 132A), an industrial record prepared by plaintiff in the course of his duties, shows, with the testimony, that petitioner and his crew had assembled eight other cars which were temporarily left on another track while the crew went over to the Casein Spur Track with a light engine to pick up a car off the Casein Spur Track; the crew was making up a train of cars and there was more work to be done in addition to picking up the car which was to be taken out of the Casein Spur Track and assembled with the others and respotting the car involved in the accident; they also had some work to do for King County; the work, of course, was interrupted by the accident (R. 133). Petitioner at no time made any close or particular observation or inspection of the conditions existing at or about the vicinity of the accident (R. 134). There was nothing to indicate to him that the place of work was unsafe; he had not been warned against the danger and had no knowledge of it. His mind was occupied with his work. Questioned as to whether his mind was occupied with anything, he said:

> "It naturally would be occupied with the work I was going to do, and getting it done, and how I was going to do it." (R. 134).

Had plaintiff known of the danger or appreciated it, he certainly would not have remained in the place where he was injured; the instinct for self preservation speaks strongly that he did not know and appreciate the danger.

ous position he was in. His negligence, if there was such, was merely contributory; it was not the sole cause of his injury; that trial court and jury have said so.

*United States Supreme Court Not Limited to Consideration of the Evidence as Stated in the Opinions of the State Court*

This court, on certiorari, is not confined to a consideration of the evidence stated by the state court in its opinion, but will review the entire record and determine for itself whether the evidence sufficed to take to the jury the issue of negligence; whether petitioner was denied a federal right by the opinion and judgment of the state court *Great Northern Ry. Co.* v. *State of Washington*, 300 U. S. 154, 81 L. ed. 573; *United Gas Public Service Co.* v. *State of Texas*, 303 U. S. 125, 143, 82 L. ed. 702; *Chicago Great Western R. Co.* v. *Rambo*, 298 U. S. 99.

Petitioner, therefore, prays that this Court issue its writ of certiorari herein and that the final judgment of the Supreme Court of Nebraska rendered herein be reversed.

Respectfully submitted,

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